(59)

No. 04-1704
Vide 04-1407, 04-1724
Title: DaimlerChrysler Corporation, et al., Petitioners
v.
Charlotte Cuno, et al.
Docketed: June 20, 2005
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (01-3960)
Decision Date: October 19, 2004
Rehearing Denied: January 18, 2005
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Apr 5 2005 | Application (04A856) to extend the time to file a petition for a writ of certiorari from April 18, 2005 to June 17, 2005, submitted to Justice Stevens. |
| Apr 7 2005 | Application (04A856) granted by Justice Stevens extending the time to file until June 17, 2005. |
| Jun 17 2005 | Petition for a writ of certiorari filed. (Response due July 20, 2005) |
| Jul 15 2005 | Brief amici curiae of Right Place, Inc., and City of Grand Rapids filed. |
| Jul 15 2005 | Brief amicus curiae of Tax Executives Institute, Inc. filed. |
| Jul 15 2005 | Brief amici curiae of International Union, et al. filed. |
| Jul 15 2005 | Brief amicus curiae of Tax Foundation filed. |
| Jul 19 2005 | Brief amici curiae of Ford Motor Company and General Motors Corporation filed. |
| Jul 20 2005 | Brief amici curiae of Louisville Area Chamber of Commerce, et al. filed. VIDED. |
| Jul 20 2005 | Brief amici curiae of Council on State Taxation, et al. filed. VIDED. |
| Jul 20 2005 | Brief amicus curiae of Michigan Manufacturers Association filed. |
| Jul 20 2005 | Brief amici curiae of Kentucky Chamber of Commerce, et al. filed. |
| Jul 20 2005 | Brief amicus curiae of Nissan of North America, Inc. filed. |
| Jul 20 2005 | Brief amicus curiae of Michigan Development Corporation filed. VIDED. |
| Jul 21 2005 | Order extending time to file response to petition to and including August 17, 2005. |
| Aug 17 2005 | Brief of respondents Charlotte Cuno, et al. in opposition filed. VIDED. |
| Aug 30 2005 | Reply of petitioner DaimlerChrysler Corporation filed. |
| Aug 31 2005 | DISTRIBUTED for Conference of September 26, 2005. |
| Sep 27 2005 | The petition for a writ of certiorari in No. 04-1724 is granted. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. Sec. 5733.33. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED. |
| Oct 24 2005 | Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner DaimlerChrysler Corporation. |
| Oct 24 2005 | Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners in 04-1724, Wilkins, et al. |
| Oct 26 2005 | Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including December 5, 2005. VIDED. |

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|---|---|
| Nov 10 2005 | Brief amici curiae of Right Place, Inc., and City of Grand Rapids filed. |
| Nov 14 2005 | Brief amicus curiae of Tax Foundation filed. VIDED. |
| Nov 28 2005 | Brief amicus curiae of Pacific Legal Foundation filed. |
| Nov 30 2005 | SET FOR ARGUMENT on Wednesday, March 1, 2006. |
| Nov 30 2005 | Consent to the filing of amicus briefs in support of either party received from counsel for the respondents. VIDED. |
| Dec 1 2005 | Brief amicus curiae of Tax Executives Institute, Inc. filed. |
| Dec 2 2005 | Brief amici curiae of Ford Motor Company and General Motors Corporation filed. VIDED. |
| Dec 5 2005 | Brief of petitioner DaimlerChrysler Corporation filed. |
| Dec 5 2005 | Joint appendix filed. VIDED. |
| Dec 5 2005 | Brief amicus curiae of Ashbrook Center for Public Affairs filed. VIDED. |
| Dec 5 2005 | Brief amicus curiae of Michigan Manufacturers Association filed. |
| Dec 5 2005 | Brief amici curiae of International Union, et al. filed. |
| Dec 5 2005 | Brief amici curiae of Directv, Inc., et al. filed. VIDED. |
| Dec 5 2005 | Motion for leave to file amicus brief filed by Washington Legal Foundation. VIDED. |
| Dec 5 2005 | Brief amici curiae of Council on State Taxation, et al. filed. VIDED. |
| Dec 5 2005 | Brief amici curiae of AlphaGenics, Inc., et al. filed. VIDED. |
| Dec 5 2005 | Brief amici curiae of City of Elyria, Ohio, et al. filed. VIDED. |
| Dec 5 2005 | Brief amicus curiae of Nissan North America, Inc. filed. VIDED. |
| Dec 5 2005 | Brief amici curiae of Chamber of Commerce of the United States, et al. filed. VIDED. |
| Dec 5 2005 | Brief amicus curiae of City of New York filed. |
| Dec 5 2005 | Brief amicus curiae of Wayne County, Michigan filed. VIDED. |
| Dec 9 2005 | CIRCULATED. |
| Jan 9 2006 | Extension of time within which to file respondents' brief on the merits to and including January 23, 2006. VIDED. |
| Jan 12 2006 | Record received from U.S.C.A. 6th Circuit. (1 binder) |
| Jan 23 2006 | Brief of respondents Charlotte Cuno, et al. filed. VIDED. (Distributed) |
| Jan 23 2006 | Brief amicus curiae of Center on Budget and Policy Priorities filed. (Distributed) |
| Jan 23 2006 | Brief amici curiae of Economics and Public Policy Professors Randy Albelda, et al. filed. VIDED. (Distributed) |
| Jan 23 2006 | Brief amicus curiae of Fiscal Policy Institute, et al. filed. VIDED. (Distributed) |
| Jan 25 2006 | Motion for divided argument filed by petitioners. VIDED. |
| Feb 7 2006 | Letter from counsel for the respondents received. VIDED. (Distributed). |
| Feb 10 2006 | Record received from U.S.D.C. - Northern District of Ohio. (4 volumes) All other pleadings are electronically filed. |
| Feb 17 2006 | Motion for divided argument filed by petitioner GRANTED. the time is to be divided as follows: 15 minutes for petitioners in No. 04-1704, and 15 minutes for petitioners in No. 04-1724. |
| Feb 22 2006 | Reply of petitioner DaimlerChrysler Corporation filed. (Distributed) |
| Mar 1 2006 | Argued. For petitioners in No. 04-1704: Theordore B. Olson, Washington, D.C. For petitioners in No. 04-1724: Douglas R. Cole, State Solicitor, Columbus, Ohio. For respondents: Peter Enrich, Boston, Mass. |

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No.

# In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

*Petitioner,*

v.

CHARLOTTE CUNO, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Ohio's investment tax credit, Ohio Revised Code § 5733.33, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

## RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioner states that DaimlerChrysler Corporation is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, which in turn is a wholly owned subsidiary of DaimlerChrysler A.G.

The parties to the proceeding in the court of appeals were plaintiffs Charlotte I. Cuno, Duane M. Arquette, Robert Scott Brundage, Julie Coyle, Helen Czapczynski, Mary Ebright, Carrie Hawkins, Kathleen Hawkins, Hutton Pharmacy, Inc., Jean E. Kaczmarek, Kim's Auto and Truck Servive, Inc., Judith A. Pfaff, Kenneth P. Pfaff, Phoenix Earth Food Co-op, Inc., Carol A. Raschke, Herbert H. Raschke, Rick Van Landingham, and defendants DaimlerChrysler Corporation, the Toledo Public School District, the Washington Local School District, the City of Toledo, the State of Ohio, the Ohio State Treasurer, the Ohio Department of Taxation, and the Ohio Department of Development.



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## PETITION FOR A WRIT OF CERTIORARI

Petitioner DaimlerChrysler Corporation ("DaimlerChrysler") respectfully petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 386 F.3d 738. The order of the court of appeals denying rehearing (App., *infra*, 31a) is unreported. The opinion of the district court (App., *infra*, 18a-30a) is reported at 154 F. Supp. 2d 1196.

### JURISDICTION

The court of appeals' judgment was entered on October 19, 2004. A timely petition for rehearing was denied on January 18, 2005. On April 7, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including June 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in relevant part:

> The Congress Shall have the Power * * * To Regulate commerce * * * among the several States.

Ohio Revised Code § 5733.33 is reproduced in the appendix to this petition at 32a-43a.

### STATEMENT

In this case, the Sixth Circuit held that the State of Ohio violates the Commerce Clause by offering business income tax incentives to encourage economic development in the

State. This holding is one of enormous practical and doctrinal importance: it calls into question the constitutionality of hundreds of similar tax programs offered by a substantial majority of the states. The uncertainty caused by the Sixth Circuit's decision accordingly has thrown into disarray the job creation efforts and economic planning of states and localities across the Nation, while disrupting the investment decisions of thousands of businesses. Because that holding also cannot be reconciled with a decision of the highest court of a state in the Sixth Circuit, rests on a novel legal theory that departs from principles announced by this Court, and finds no support in the policies of the Commerce Clause, further review is warranted. Given the significance of the issue presented here, it plainly should be this Court, and not the Sixth Circuit, that provides guidance to states and taxpayers across the country on the permissible use of business tax incentives.

### *1. Ohio's Income Tax Credit*

"Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion." Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996) (footnotes omitted). Such "[l]ocation[al] incentives have become an ubiquitous feature of the state tax scene." Peter Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 384 (1996). And of the myriad state and local provisions that are intended to attract and encourage business development, "[t]he most common form of state tax incentive in this country is the income tax credit." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 817.

This case involves a constitutional challenge to such a provision, Ohio's investment tax credit (or "ITC"), which is typical of business development income tax incentives offered by states across the country.[1] Ohio's ITC provides that a taxpayer may receive a "nonrefundable credit * * * against the tax imposed by section 5733.06 of the Revised Code" (Ohio's corporate franchise tax, which is based on corporate income or net worth) if the taxpayer "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by December 31, 2006. Ohio Rev. Code ("O.R.C.") § 5733.33(B)(1). This investment tax credit of seven and one-half percent is available in an amount equal to "the cost of the new manufacturing equipment purchased during the calendar year for use in a county" over and above the average annual cost of new manufacturing machinery and equipment purchased by the taxpayer for use in that county during three specified prior years.[2] The credit amount increases to 13½ percent if the otherwise qualifying investment is made in an "eligible area" that suffers from specified levels of unemployment or poverty, or has experienced significant closing or downsizing by



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[1] Ohio law also provides that a municipal corporation may offer a property tax exemption to an enterprise that develops facilities or preserves employment in a distressed area. O.R.C. § 5709.62. Pursuant to this provision, DaimlerChrysler received a ten-year, 100% exemption from taxes on certain personal property first used in connection with its plant in Toledo. See App., *infra*, 2a. Although plaintiffs challenged the constitutionality of the property tax exemption, the district court and the Sixth Circuit both upheld that provision. *Id.* at 11a-14a. Plaintiffs have sought review of that aspect of the decision below in a petition now pending before the Court, No. 04-1407, *Cuno* v. *DaimlerChrysler, Inc.* DaimlerChrysler is responding to that petition in a separate brief.

[2] For credits claimed in 1999 and thereafter, the baseline period is the years six, five, and four years before the year for which the credit is claimed. Thus, for example, to determine whether an investment in 2000 is eligible for any credit, one would compare the amount invested in 2000 with the average amount invested by the taxpayer in that same county in 1994, 1995, and 1996.

local employers. *Id.*, §§ 5733.33(C)(2), (A)(8)-(16). The credit may not exceed $1,000,000 unless, in the year for which it is claimed, the taxpayer has increased its overall ownership of manufacturing equipment in the State. *Id.*, § 5733.33(B)(2)(a).

The ITC has been a significant tool used by Ohio to encourage in-state investment. In its petition seeking rehearing before the Sixth Circuit, Ohio represented that, since the credit's inception in 1995, corporations have relied upon the provision in investing more than $30 billion in Ohio plants and equipment. No. 01-3960, *Cuno* v. *DaimlerChrysler Corp.* (6th Cir.), Ohio's Pet. For Reh'g, at 4. In 2002 alone, more than 2,100 corporate taxpayers took Ohio ITC credits totaling more than $73 million. *Ibid.*

### 2. *Background Of The Litigation*

On November 12, 1998, petitioner DaimlerChrysler entered into an agreement with the City of Toledo, Ohio, to construct a new vehicle assembly plant near the company's existing facility in the City. App., *infra*, 2a. DaimlerChrysler estimated that it would invest approximately $1.2 billion in the new plant and that, as a result of the investment, the project would provide jobs for thousands of workers. *Ibid.* As an incentive for DaimlerChrysler to undertake the project, which is located within an economically distressed area, the City and the affected local school districts agreed that the company would obtain the tax exemptions that are available under state law. Pursuant to O.R.C. § 5733.33, DaimlerChrysler accordingly has received the investment tax credit of 13½ percent for investments related to the project through December 31, 2000.

Invoking the Constitution's Commerce Clause, the plaintiffs (respondents in this Court), most of whom are local Ohio taxpayers, then brought this action in Ohio state court against DaimlerChrysler, the State of Ohio, and the City of Toledo. Plaintiffs sought to invalidate both the tax credit



granted to DaimlerChrysler and the Ohio statute making the credit available. The defendants removed the case to the U.S. District Court for the Northern District of Ohio, which rejected plaintiffs' claims on the merits and ordered the complaint dismissed. App., *infra*, 18a-30a. After canvassing the relevant case law, the court concluded that the "investment tax credit is not akin to a tariff, since it does not burden in the slightest the transfer of goods in interstate commerce," and that the credit also does not punish activity carried on outside Ohio. *Id.* at 28a. The court accordingly held that the tax credit does "not 'discriminate against interstate commerce,'" concluding that it could not find the credit unconstitutional without "violating the clear mandate of Supreme Court precedent." *Id.* at 29a.[3]

### 3. *The Decision Below*

The Sixth Circuit reversed in relevant part, holding the investment tax credit unconstitutional. App, *infra*, 1a-17a. The court began by recognizing that "it is legitimate for Ohio to structure its tax system to encourage new interstate economic activity" and that the Commerce Clause does not "prevent a state from 'compet[ing] with other States for a share of interstate commerce.'" *Id.* at 4a-5a (quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 336-337 (1977)). The court also acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* at 6a. And noting the defendants' argument that "tax incentives, like the Ohio tax credit, are permissible so long as they do not penalize out-of-state economic activity," the court of appeals agreed that "it is arguably possible to fit certain of the Supreme Court's cases into this framework." *Id.* at 9a. The court added that the Supreme

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[3] In addition, the district court rejected claims challenging the ITC and the property tax exemption under the equal protection clause of the Ohio Constitution. The court of appeals affirmed that holding. See App., *infra*, 14a-17a.

Court "has never precisely delineated the scope of the doctrine that bars discriminatory taxes." *Id.* at 5a.

Having said all that, however, the court of appeals nevertheless went on to hold that Ohio's investment tax credit violates the Commerce Clause. In doing so, the court appeared to accept plaintiffs' argument that the credit is invalid because its "economic effect * * * is to encourage further investment in-state at the expense of development in other states and that the result is to hinder free trade among the states." App., *infra*, 9a. To reach this conclusion, the court found no meaningful distinction "between laws that benefit in-state activity and laws that burden out-of-state activity" because, "economically speaking, the effect of a tax benefit or burden is the same." *Id.* at 9a, 10a. At the same time, the court rejected defendants' argument that the investment tax credit should be likened to a "direct subsidy," even though a subsidy and the credit "would no doubt have the same economic effect." *Id.* at 10a. Accordingly, although the court declared itself "sympathetic to efforts by the City of Toledo to attract industry into its economically depressed areas" (*id.* at 11a), it reversed "that portion of the district court's judgment upholding as constitutional the investment tax credit provision." *Ibid.*

## REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision in this case involves a question of exceptional importance. Invoking the Commerce Clause, the court of appeals invalidated a crucial tool used by Ohio to retain employment and further economic development. And the decision below has an impact that far transcends Ohio's borders, calling into question the constitutionality of very similar economic development laws that are in force in states across the Nation – thus disrupting ongoing efforts to foster investment and job creation.

That decision should not stand. It is inconsistent with the settled understanding that the Commerce Clause's anti-



discrimination principle was designed to invalidate *protectionist* state legislation that provides a competitive advantage to in-state businesses, and has no role to play when – as is true in this case – the sole purpose of a challenged state law is to reward intrastate investment. As this Court has explained repeatedly, nothing in the Constitution prevents a state from "compet[ing] with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 336-337. That is precisely what Ohio is doing here. Indeed, the Sixth Circuit's ruling directly conflicts with the Michigan Supreme Court's decision upholding a Michigan tax abatement statute that was designed to encourage local investment in that State. Because the decision below has thrown into confusion both the business incentive programs of dozens of states and fundamental Commerce Clause doctrine, review of that decision by this Court plainly is in order.

### A. The Decision Below Involves A Recurring Issue Of Great Practical Importance

#### *1. The Sixth Circuit's Decision Has Disrupted State Income Tax Abatement Programs Nationwide*

At the outset, the extraordinary importance of this case to the national economy and to economic development in states across the Nation makes review of the Sixth Circuit's decision imperative. There is no denying that the court of appeals' holding "sent shock waves throughout the state and local tax community" and that, "[g]iven the widespread use of similar legislation[,] the potential ramifications [of the decision] nationwide are staggering." Timothy Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. TAX'N 359, 359 (2004). As we explain below, the Sixth Circuit's holding is inconsistent with the approach taken by this and other courts. But even if that were not the case, the far-reaching implica-

tions of the decision would warrant immediate review by this Court. Indeed, "[i]n light of the importance of the issues raised by this case," plaintiffs have represented that they "do not intend to oppose [the] petitions for review of the constitutionality of Ohio's tax credit." No. 04-1407, *Cuno* v. *DaimlerChrysler, Inc.*, Pet. For Cert., at 7.[4]

As has been widely noted, the rule announced by the Sixth Circuit has implications for the validity of literally hundreds of statutes in dozens of states. Virtually all states provide tax and similar economic incentives for local economic activity. See, *e.g.*, Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997); 1 MULTISTATE CORPORATE INCOME TAX GUIDE (CCH Internet) ¶ 180 (2001). And income tax benefits of the sort invalidated by the Sixth Circuit are "the most common form of tax incentive." Hellerstein & Conen, *supra*, 81 CORNELL L. REV. at 797. See Enrich, *supra*, 110 HARV. L. REV. at 384.[5] Tax abatement provisions thus "constitute long-standing, familiar, and central features of every state's taxing system." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 805. The importance of this economic development tool to the states is apparent from the frequency with which it is applied: the aggregate amount of business location tax incentives as of 1996 approached $50 billion (see Kenneth P. Thomas, COMPETING

[4] That petition should be captioned "*Cuno* v. *DaimlerChrysler Corporation.*"

[5] One study found more than 330 statutory income or franchise tax credits and incentives offered by 46 states. See Gillis, *supra*, 101 J. TAX'N at 360 (citing Mark L. Nachbar, *Credits and Incentives: Alabama Through Hawaii*, 1450 T.M. (BNA) (2005)). Another state-by-state survey "found that, of forty-eight states responding, only Wyoming had not enacted at least one location incentive between 1991 and 1993." Enrich, *supra*, 110 HARV. L. REV. at 383-384.



FOR CAPITAL: EUROPE AND NORTH AMERICA IN A GLOBAL ERA 159-160 (2000)), and doubtless is vastly higher today.

Yet the Sixth Circuit's decision calls into question the constitutionality of all state income tax and related business incentives, most of which are unlikely to be distinguishable from Ohio's in any material respect. See Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 802 ("Almost no state income tax incentive – and there are hundreds of them across the country – meets the * * * requirement of strict geographic neutrality."). As a consequence, "virtually every state in the union has some form of tax credit or incentive that may now be under a constitutional cloud. Moreover, businesses across the country, which have relied on these incentives in making in-state investment decisions, have billions of dollars at stake in the resolution of the controversy." Gillis, *supra*, 101 J. TAX'N at 359.

The result is that the Sixth Circuit's decision is having an immediate impact on state and local governments, businesses, and workers in almost every state. "The decision leaves many states (40 or more), and potentially thousands of businesses, under a cloud of uncertainty about the viability of existing tax incentive arrangements involving billions in capital investment." John Biggins, *Investment Tax Credit Incentive Violates Commerce Clause, Says Sixth Circuit*, 14 J. MULTISTATE TAX'N & INCENTIVES 36, 36 (2004). And this effect is being felt nationwide because the decision below creates doubts about the validity of laws in states *outside* the Sixth Circuit. See Gillis, *supra*, 101 J. TAX'N at 362 ("For taxpayers in other states, both those within and outside the jurisdiction of the Sixth Circuit, the availability of similar incentives is under a pall."). Immediate review by this Court – of a decision that is causing widespread "unpredictability and instability," and thus disrupting economic development efforts across the Nation (Biggins, *supra*, 14 J. MULTISTATE TAX'N & INCENTIVES at 38) – accordingly is warranted.

### 2. *The Decision Below Has Handicapped Economic Development Efforts In The Sixth Circuit*

Moreover, review would be in order even if the Court considers only the effects of the decision below on states in the Sixth Circuit. The court of appeals' decision invalidated a statute that is a principal tool used by Ohio and its local governments to maintain employment and encourage economic development. As we have noted, the ITC has been invoked to attract billions of dollars in investment and to retain many thousands of jobs in Ohio over the past decade. Yet the decision below calls an abrupt halt to use of this tool to bolster the State's economy and workforce.

At the same time, the court of appeals' holding places in grave doubt the constitutionality of economic development programs used by all of the other states in the Sixth Circuit.[6] Those laws are now under a cloud – which means that, if states in other circuits disregard the uncertainty created by the Sixth Circuit's holding and continue to provide location tax incentives (and if businesses, improbably, disregard that uncertainty and rely on those incentives), Ohio, Kentucky,

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[6] Among other things, Kentucky grants companies that invest in economic development projects within qualified zones a 100% credit against the state income taxes that would otherwise be attributable to those projects. Ky. Rev. Stat. Ann. §§ 141.400, 154.45-010, 154.23-035. Michigan also grants tax credits to companies that make new investments within designated enterprise zones. Mich. Comp. Laws § 208.37(a). And Tennessee offers businesses a 1% excise tax credit for investments in industrial machinery within the State (Tenn. Code Ann. § 67-4-2009(4)(A)), as well as credits of $2,000 to $5,000 against franchise or excise tax liability for each net new full-time employee hired in Tennessee. Tenn. Code Ann. § 67-2-2109(B)(2). In an amicus brief filed in support of rehearing in the Sixth Circuit, these States represented that their various incentive programs overall had generated some $39 billion in investment from 1995 through 2002.



Michigan, and Tennessee will be disadvantaged in seeking to attract jobs and economic development that could be located elsewhere. This is a significant handicap to impose on States that rely on manufacturing and industry as a mainstay of their economies.

### 3. *The Sixth Circuit's Ruling Conflicts With A Decision Of The Michigan Supreme Court*

The uncertainty created by the decision below is especially acute because the Michigan Supreme Court, in *Caterpillar, Inc.* v. *Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), *upheld* a state tax incentive that in relevant respects was quite similar to Ohio's ITC. The Michigan provision provided a capital acquisition deduction (the "CAD") from the State's Single Business Tax (a value-added type tax on business activity) for the acquisition of capital assets – but "only capital acquisitions related to Michigan business activity" benefited from the deduction. *Id.* at 186. See generally *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 385 (1991) (upholding the Single Business Tax against Commerce Clause challenge).

In particular, the CAD provided a deduction for the cost of acquiring real property, but only if "'the assets are physically located in Michigan.'" *Caterpillar*, 488 N.W.2d at 187 (citation omitted). Under this provision, "two otherwise similarly situated companies that invest in real property of equal value during the tax year will receive either a substantial deduction or no deduction at all, depending on whether that property is located in state or out of state." *Id.* at 203 (Cavanaugh, C.J., dissenting).[7] Michigan's CAD thus provided a

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[7] In addition, the CAD offered a deduction measured by the value of tangible personal property acquired by the taxpayer during the tax year. Although this deduction ostensibly was available no matter where the new tangible assets were located, it was calculated by multiplying the value of the newly acquired personal property by the average of two ratios: the ratio of the taxpayer's Michigan pay-

tax benefit for in-state business investment, while denying an equivalent benefit for equivalent business investment made out-of-state – just as does Ohio's ITC. Yet the Michigan Supreme Court had no difficulty finding the CAD constitutional under the Commerce Clause, explaining that the provision should not be regarded as discriminatory on its face because it "is available for any taxpayer" (*id.* at 192 (majority opinion)) and noting that the deduction did not have an impermissible purpose because the U.S. Supreme Court has "held that the promotion and development and investment of business in Michigan does not violate the Commerce Clause." *Ibid.* The court added that "a discriminatory effect does not result from fair encouragement of in-state business like that provided by [the CAD]." *Id.* at 193.

This conflict between the Michigan Supreme Court and the Sixth Circuit – the Circuit in which Michigan is located – will leave the law in a state of intolerable confusion if the court of appeals' decision stands. It creates unresolvable uncertainty about the constitutionality of tax incentives offered by states in the Circuit and invites forum shopping when such incentives are challenged. This consideration, too, warrants immediate review of the case by this Court.

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roll to its total payroll, and the ratio of the taxpayer's Michigan property to its total property. 488 N.W.2d at 186-187 (majority opinion). As a consequence of this formula, which makes the deduction more valuable as more of a taxpayer's property is located in-state, the inevitable effect of the personal property CAD was "that a greater deduction, resulting in a lower effective tax rate on the Michigan-apportioned tax base, is afforded * * * to * * * a company investing the new personal property in state, as opposed to a company investing the new personal property out of state." *Id.* at 202 (Cavanaugh, C.J., dissenting).



### B. The Decision Below Departs From Principles Announced By This Court And Will Confuse Commerce Clause Doctrine

The need for review is particularly compelling because the Sixth Circuit's decision marks an extraordinary departure from any common-sense understanding of the Commerce Clause. Adopting what the plaintiffs themselves described below as a "novel legal theory" (No. 01-3960, *Cuno* v. *DaimlerChrysler Corp.* (6th Cir.), Pl. Br., at viii), the court of appeals struck down a law that was *not* designed to disadvantage interstate commerce, does *not* provide a meaningful competitive benefit to Ohio businesses vis-à-vis out-of-state competitors, does *not* disturb the flow of commerce across Ohio's borders – and *does* encourage the movement of business across state lines. In doing so, the court did not describe any articulable Commerce Clause policy that was advanced by its holding. Because that decision contributes to significant uncertainty about the scope of the Commerce Clause, intervention by this Court is called for.

#### *1. There Is Uncertainty About The Application Of Commerce Clause Principles To Economic Development Tax Incentives*

The outcome in the Sixth Circuit may be attributable to a degree of confusion in the law of the Commerce Clause as it relates to state economic development efforts. This Court has recognized that its analysis in this area "has left much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 403 (1984) (citations and internal quotation marks omitted). Commentators have agreed that there is "a palpable tension in the Supreme Court's decisions," marked by an "ill-defined distinction between the constitutional carrot and the unconstitutional stick in state tax, subsidy, and related cases." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 791-

792. See, *e.g.*, Clayton Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 493 (1997) ("One point on which commentators agree is that our Commerce Clause jurisprudence is confused."). Indeed, "the Court has not had occasion to address a challenge grounded in the claim that a state tax provision's primary purpose or effect is to attract business to locate or expand in the state." Enrich, *supra*, 110 HARV. L. REV. at 381. In the absence of such clear guidance, respected commentators have divided on the constitutionality of provisions like the ITC. Compare Phillip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 929-937 (1986) (such provisions are constitutional); Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 STATE TAX NOTES 189 (2005) (same); Gillette, *supra*, 82 MINN. L. REV. at 449 ("Locational incentives directed at business would appear, on their face, to serve the[] objectives of interstate competition."), with Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 817-825 (such provisions unconstitutional); Enrich, *supra*, 110 HARV. L. REV. 377 (same).

This disagreement perhaps is not surprising, because the question in cases like this one lies at the intersection of two competing Commerce Clause principles that point in very different directions. On the one hand, it is settled that the Clause precludes states from discriminating against out-of-state or interstate businesses, thus "avoid[ing] the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (citations and internal quotation marks omitted).[8] On the other hand, however, the

[8] Under the test applied by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), a state tax satisfies the requirements of the Commerce Clause if (1) the activity taxed has a substantial nexus with the taxing State; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the State. See also, *e.g.*, *Jefferson Lines*, 514 U.S. at 183. Plaintiffs do not deny that Ohio's ITC satisfies the first, second, and fourth prongs of this test. See App., *infra*, 4a.



Court has emphasized that "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imps., Ltd.* v. *Dias*, 468 U.S. 263, 272 (1984). As we explain below, we believe that the Sixth Circuit erred in where it struck the balance between these principles. But even if we are wrong in that submission, given the great uncertainty and confusion in the law – a confusion that has been significantly compounded by the Sixth Circuit's decision – guidance from this Court is urgently needed.

### 2. *The Commerce Clause Proscribes Protectionist State Laws*

Because the Commerce Clause's fundamental purpose was "'to keep commercial intercourse among the States free from all invidious and partial restraints'" (*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 571 (1997) (quoting *Gibbons* v. *Ogden*, 9 Wheat. 1, 231 (1824) (Johnson, J., concurring in the judgment)), the Clause has been understood to proscribe state laws that "discriminate[] against or unduly burden[] interstate commerce and thereby 'imped[e] free private trade in the national marketplace.'" *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997) (quoting *Reeves, Inc.* v. *State*, 447 U.S. 429, 437 (1980)). As the Court has explained, this anti-discrimination principle means that "the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-

state competitors." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 330 (1996) (internal quotation marks and citations omitted). See, *e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 577-578; *Jefferson Lines*, 514 U.S. at 197 (1995); *Guy* v. *Baltimore*, 100 U.S. 434, 439 (1879).

In light of this purpose underlying the Clause, the "paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 193 (1994). See Gerald Gunther & Kathleen Sullivan, CONSTITUTIONAL LAW 141 (13th ed. 1997) ("the national commerce power, it was hoped, would afford the means to end hostile state restrictions, retaliatory trade regulations, and protective tariffs on imports from other states"). While the Court has applied the Clause to many variations on that paradigm – for example, to laws that tax "'a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State'" (*Fulton Corp.*, 516 U.S. at 331 (quoting *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992)), or that "discourage domestic corporations from plying their trades in interstate commerce" (*id.* at 333) – it has long been settled that the Clause is fundamentally directed at the use of state authority "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). See, *e.g.*, *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism"); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 126 (1978).

When state laws do not run afoul of this requirement – that is, when they do not impose a protectionist regime or penalize those who engage in interstate trade – nothing in the



Commerce Clause's antidiscrimination principle prevents the use of state tax statutes to provide incentives for in-state economic activity. Even while invalidating protectionist state laws, the Court has emphasized repeatedly that it did not mean to

> prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy.

*Boston Stock Exch.*, 429 U.S. at 336-337. The Court thus has stressed that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278 (1988). To the contrary, "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imps.*, 468 U.S. at 271. See also, *e.g.*, *Trinova Corp.*, 498 U.S. at 385 (it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State").

In light of this principle, the Court has indicated that, for example, a state subsidy provided only to in-state companies "ordinarily imposes no burden on interstate commerce, but merely assists local business," even though such a regime obviously distinguishes between domestic and foreign enterprises. *West Lynn Creamery*, 512 U.S. at 199. See *id.* at 199 n.15; *New Energy*, 486 U.S. at 278 ("[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition"); Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 792 ("discriminatory subsidies * * * are almost always constitutional"); Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L. J. 965 (1998) (same). And several Justices have declared that

tax incentives may be equally permissible: the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring). See *Chemical Waste Mgmt.*, 504 U.S. at 351 (Rehnquist, C.J., dissenting) ("[t]here seems to be nothing * * * that would prevent [a State] from providing subsidies or other tax breaks to domestic industries").

### *3. The Decision Below Finds No Support In This Court's Holdings*

Against this background, the Sixth Circuit was wrong in its simplistic view that a state violates the Commerce Clause whenever its tax programs "further investment in-state at the expense of development in other states." App., *infra*, 9a. Indeed, the court of appeals' rule, if meant to be taken literally, cannot be correct. For example, it is universally agreed that states may cut their general tax rates to lure business from neighboring jurisdictions. See *West Lynn Creamery*, 512 U.S. at 199 n.15. Yet State A surely "furthers investment in-state at the expense of development in other states" in a very dramatic way when it lowers its corporate tax rates below those imposed by State B, both by making State A more attractive to business than State B and by giving corporate taxpayers in State A a competitive advantage over businesses that pay State B's higher rates. See generally *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372, 1387 (8th Cir. 1997) (noting that companies may avoid states with "comparatively high state taxes"). The Sixth Circuit's rule



accordingly cannot provide a sound basis for decision under the Commerce Clause.[9]

Nor does the holding below find support in the three decisions of this Court that were cited by the Sixth Circuit. See App., *infra*, 6a-9a (citing *Boston Stock Exchange*, *Maryland* v. *Lousiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp.*). Those decisions certainly do not hold that it is impermissible for states to "further investment in-state at the expense of development in other states." And Ohio's ITC does not burden out-of-state transactions, activities, or actors, as was true of the laws challenged in each of the decisions relied upon by the court of appeals. Those laws "were really tariffs on interstate sales, manufacturing, or services," which involved straightforward attempts to benefit in-state firms at the expense of out-of-state competitors or to penalize the conduct of business in other states. Firestone, *supra*, 36 STATE TAX NOTES at 190. Ohio's ITC has no such effect.

In *Boston Stock Exchange*, the Court disapproved of a New York statute that, to protect the New York stock exchanges from out-of-state competitors, imposed a lower transfer tax on securities transactions completed through New York brokers than on identical transactions using out-of-state brokers. 429 U.S. at 324-325. Striking down the dif-

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[9] To reach its expansive holding, the court of appeals rejected what it characterized as the defendants' "view" that "the Commerce Clause is primarily concerned with preventing economic protectionism – that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce." App., *infra*, 9a. But as we have noted, that view is not something invented by the defendants in this case; using almost identical language, *this Court* has explained that "the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp.*, 516 U.S. at 330 (internal quotation marks and citations omitted).

ferential tax rate, the Court held "only that * * * no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 336-337.

Similarly, in *Maryland* v. *Lousiana*, Louisiana imposed a tax on the "first use" of natural gas imported into the State that was identical in amount to the severance tax imposed on Louisiana gas producers. 451 U.S. at 731-733. But "exemptions and credits for the First-Use Tax" gave taxpayers subject to the levy a credit on any severance tax owed to Louisiana, while purchasers of gas used for consumption in the State were provided credits against other Louisiana taxes. *Id.* at 732-733. The result was that "Louisiana consumers of [out-of-state] gas for the most part [were] not burdened by the [First-Use] Tax." *Id.* at 733. The Court held that this regime "unquestionably discriminates against interstate commerce in favor of local interests" because "[c]ompetitive users in other States are burdened with the Tax" (*id.* at 756) while "Louisiana consumers of [out-of-state] gas are * * * substantially protected against the impact of the First-Use Tax." *Id.* at 757.

Finally, in *Westinghouse Electric Corp.*, the Court invalidated a New York law that taxed corporate income derived from subsidiaries engaged exclusively in export activity, but then awarded the parent company a partially offsetting tax credit that was dependent on the proportion of its total shipping activities that the subsidiary conducted in New York; the credit increased as the subsidiary "move[d] a greater percentage of its shipping activities into the State of New York" (466 U.S. at 400), and decreased as the firm increased its shipping activities in other states. As a result, the scheme "not only * * * 'provide[d] a positive incentive for increased business activity in New York State,'" "but also * * * penalize[d] increases in the [taxpayer's] shipping activities in other States." *Id.* at 400-401. The Court regarded this latter element as "the most pernicious effect of the credit scheme" because it "lower[ed] the incentive [the tax law] award[ed] for in-



state * * * activity as the [taxpayer] increase[d] its out-of-state activity" (*id.* at 401 n.9), and therefore used "discriminatory state taxes to burden commerce in other States." *Id.* at 406.

The flaw in the New York scheme thus was its reliance "on *both* a taxpayer's in-state *and* out-of-state activities in determining the taxpayer's effective tax rate." Tatarowicz & Mims-Velarde, *supra*, 39 VAND. L. REV. at 929 (emphasis added). Indeed, after referring to "job-incentive credits" and "investment-tax credits," the Court specifically "reiterate[d] that it is *not* the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, *i.e.*, the percentage of a specific segment of the corporation's business that is conducted in New York." 466 U.S. at 406 n.12 (emphasis added). "The clear implication" of this statement is that, absent an attempt to punish an increase in the taxpayer's out-of-state business, "investment tax credits and job incentive credits are *not* 'allowed on an impermissible basis' because they do not 'discriminatorily tax the products manufactured or the business operations performed in another state.'" Firestone, *supra*, 36 STATE TAX NOTES at 193 (emphasis added).

#### *4. Ohio's ITC Is Consistent With Commerce Clause Principles*

Given these holdings, the Sixth Circuit's decision "is not supported by existing case law and * * * the decision represents a significant and unwarranted expansion of the dormant Commerce Clause beyond its present scope." Firestone, *supra*, 36 STATE TAX NOTES at 189. See Biggins, *supra*, 14 J. MULTISTATE TAX'N & INCENTIVES at 37 (the Sixth Circuit's decision "is widely considered a departure from prior law"). In the Commerce Clause context, the Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects" (*West Lynn Creamery*, 512 U.S. at 201), with the outcome turning on "the unique characteristics of the statute

at issue and the particular circumstances in each case." *Boston Stock Exch.*, 429 U.S. at 329. The Court has made clear that this "determination as to whether a tax incentive is coercive should depend on its 'practical or economic effect' and on 'economic realities.'" Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 811 (quoting *Goldberg* v. *Sweet*, 488 U.S. 252, 262 (1989) and *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 295 (1987)). And here, Ohio's ITC plainly is not a protectionist measure that was designed to help in-state businesses overcome out-of-state competitors; it does not penalize or otherwise impose burdens on out-of-state economic activity; and it establishes no requirements that disturb the free flow of commerce across Ohio's borders. Using the nuanced analysis of the statute's "purposes and effects" that is required by this Court's decisions, the credit accordingly does not run afoul of the Commerce Clause.

*First*, the credit plainly was not designed to give a competitive advantage to in-state taxpayers of the sort found problematic in *Boston Stock Exchange* and *Maryland* v. *Louisiana*. In those cases, states sought to benefit particular domestic industries by directly burdening out-of-state competitors with what amounted to protective tariffs. In contrast, Ohio confers no systematic advantage on in-state businesses, and does not in any way shield local industry from competition by out-of-state companies.

Indeed, many Ohio businesses will be unable to obtain the credit. Because the credit is available only to firms making new investments in the State that exceed the company's average investment over three baseline years, companies that confine their business to Ohio often will not qualify – but out-of-state firms making their first investment in Ohio *always* will qualify for the credit.[10] Thus, far from discouraging

[10] To qualify for a credit, any taxpayer (in-state or out-of-state) must make a new investment in Ohio. Thus, taxpayers that already engage in manufacturing in the state have no advantage over out-of-state taxpayers in obtaining the credit. As a practical matter, a business that has *no* current capital investment in Ohio can more easily qualify for the credit, because *any* initial investment it makes in the State will constitute an increase over its prior (zero) investment and thus will be eligible for a credit. By contrast, to receive a credit, a business that currently invests in a county would have to make an investment that exceeded its average investment in that county in the baseline years – and only the incremental or "excess" investment would qualify for any credit.



interstate business, the Ohio credit encourages companies to operate across state lines. Needless to say, if every state had such a system, interstate businesses would not be systematically disadvantaged. To the contrary, all companies (local and interstate) would be eligible to obtain a tax credit of equal amount wherever they did business, and interstate firms would, if anything, be at an *advantage* because the preference given to new investment in the taxing jurisdiction would make such businesses far likelier to obtain the credit than would be companies that confined their operations to one state. See Gillette, *supra*, 82 MINN. L. REV. at 448 ("competition among states for businesses may actually facilitate the objective created by the Commerce Clause of achieving economic integration for the benefit of the nation as a whole"); Firestone, *supra*, 36 STATE TAX NOTES at 194 (Ohio's ITC "encourag[es] interstate commerce by burdening a sedentary local business"). Rather than conventional protectionist legislation, the credit thus is a permissible attempt to "encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336.

*Second*, the credit does not vary depending upon the percentage of its total business that a company conducts in Ohio, as did the statute invalidated in *Westinghouse Electric Corp.*, but instead focuses exclusively on the taxpayer's in-state activity. As two leading commentators have described the crucial distinction in this area,

> a state tax incentive that focuses exclusively on a taxpayer's in-state activities does not have the sort of negative impact on interstate commerce with which the commerce clause is concerned. Rather, the key to finding a tax incentive unconstitutionally discriminatory appears to be a reliance by the state tax provision on both a taxpayer's in-state and out-of-state activities in determining the taxpayer's effective tax rate. Such a provision clearly has a negative impact on interstate commerce.

Tatarowicz & Mims-Velarde, *supra*, 39 VAND. L. REV. at 928-929. In contrast, "[a] tax incentive that does not penalize out-of-state activity presumably could withstand scrutiny under the commerce clause after *Westinghouse*." *Id.* at 934. And here, the Ohio credit satisfies this test. Unlike the tax credit in *Westinghouse*, the same credit is available regardless of the extent of the taxpayers' overall presence in the state, and the amount of the credit is not reduced as the taxpayer increases its investment in other states.

*Third*, the activity that benefits from the Ohio credit (capital investment) is not itself subject to state tax. That stands in sharp contrast to the situation in the cases where the Court invalidated tax incentives as discriminatory; in *Boston Stock Exchange* and *Maryland* v. *Lousiana*, the domestic activities that the states sought to encourage were themselves subject to tax, and the states encouraged these activities by discriminatorily relieving domestic taxpayers of a portion of the tax. See Firestone, *supra*, 36 STATE TAX NOTES at 191, 192. That approach resulted in the systematic differential taxation of particular types of interstate commerce in a manner that burdened out-of-state competitors. Here, however, the ITC is not an exemption that lowers the effective rate of taxation on a particular activity, but is instead a one-time, bottom line subtraction from a tax that Ohio was entitled to collect. That subtraction is designed to encourage conduct (capital investment) that differs from the taxed activity (the production of income within the State). As such, it is the pre-



cise equivalent of direct spending by the State on, for example, construction of roads to a new plant – spending that might substantially lower the cost of developing the facility, but that plainly would not violate the Commerce Clause. See Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 835 ("[e]conomists know that the real-world impact of such a subsidy mirrors the effect of the credit") (footnote omitted).

To be sure, the Court has drawn a distinction between subsidies for domestic commerce, which "ordinarily" are permissible (*New Energy*, 486 U.S. at 278), and tax exemptions, which in some circumstances have been held invalid. See *Camps Newfound/Owatonna*, 520 U.S. at 588-591. But the Court has indicated that "this distinction [between subsidies and tax benefits] is * * * applicable to claims that certain state action [is] *designed to give residents an advantage in the marketplace*." *Id.* at 590 (emphasis added). And in this case, where the State's credit is a one-time benefit for engaging in particular activity that is *not* designed to offer a systematic advantage to domestic businesses over out-of-state competitors, the credit's similarity to a subsidy should be decisive. "From a constitutional perspective, it is often compelling to view such one-time, targeted tax benefits as akin to direct expenditures rather than as part of the same category occupied by paradigmatic tax benefits." Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 409 (1998). Cf. *Westinghouse Elec. Corp.*, 466 U.S. at 405 (Court has "declined to attach any constitutional significance to such formal distinctions that lack economic substance").

This is not to say, of course, that all subsidies and tax exemptions must be equated for Commerce Clause purposes. Instead, our point is that a particular kind of tax credit – one that is available for engaging in one-time, non-repetitive business activity, and that does not give in-state businesses any continuing competitive advantage over out-of-state firms – is precisely equivalent to a direct subsidy. Nothing in this

Court's decisions, which repeatedly emphasize that Commerce Clause analysis must turn on "the unique characteristics of the statute at issue and the particular circumstances in each case" (*Boston Stock Exch.*, 429 U.S. at 329), suggests that this kind of functional parallel between related tax and subsidy programs is inappropriate.

### *5. The Decision Below Actually Discourages Interstate Business*

At bottom, the controlling question here is whether the credit is a permissible attempt to encourage domestic industry rather than illegitimate protectionism. In answering that question, it is revealing that the plaintiffs here are *not* out-of-state entities who pay the challenged tax, competitors of taxpayers who obtain favorable tax treatment, or customers of entities that are handicapped by discriminatory taxes. Far from it: DaimlerChrysier's competitors vigorously *support* the constitutionality of Ohio's ITC. Instead, the plaintiffs here are, for the most part, residents of the taxing State who would like Ohio to collect *more* tax from out-of-state companies doing business in the State.

This is an exceedingly strange use of the Commerce Clause. Even critics of location tax incentives recognize that such provisions

> are quite different from the more familiar targets of Commerce Clause attacks, which, like tariffs, either protect local businesses from multistate competitors or extract tax revenues disproportionately from out-of-state businesses. Whereas the out-of-state challenger to these sorts of provisions can convincingly claim that the state unfairly excluded or penalized outsiders, such pleas are far less compelling when the challenged provision is designed to invite, even to entice, the outsiders in.

Enrich, *supra*, 110 HARV. L. REV. at 412. After all, the whole point of the Commerce Clause anti-discrimination principle



is "creating a level playing field between the taxpayer and its in-state competitors. * * * Indeed, it is this consequence of invalidating the tax incentive that provides the essential justification for judicial intervention under the dormant Commerce Clause." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 872.

But there is no such justification in this case, where local residents have invoked the Clause to prevent their State from giving a break to an out-of-state taxpayer that is engaged in interstate commerce. Here, "competition would not be served by eliminating any tax differential * * *, and the dormant Commerce Clause has no job to do." *General Motors Corp.*, 519 U.S. at 303. Because none of the concerns that animate the Clause are implicated here, there is no basis for the Sixth Circuit's decision to strike down one of Ohio's principal tools for attracting jobs and fostering economic development. And because that decision has profoundly important national consequences, review of the decision below by this Court is warranted. The Court accordingly should grant the petitions filed by DaimlerChrysler and the State of Ohio challenging the Sixth Circuit's decision that the ITC is unconstitutional.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2005

# APPENDIX

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United States Court of Appeals,
Sixth Circuit.

CHARLOTTE CUNO, ET AL.,
*Plaintiffs-Appellants,*

v.

DAIMLERCHRYSLER, INC., et al.,
*Defendants-Appellees.*

No. 01-3960.

Argued: Feb. 4, 2003.
Decided and Filed: Oct. 19, 2004.
Rehearing En Banc Denied: Jan. 18, 2005.

Before: SILER, DAUGHTREY, and COLE, Circuit Judges.

DAUGHTREY, Circuit Judge.

The plaintiffs initiated this litigation in state court, challenging the validity of certain state tax credits and local property tax abatements that were granted to DaimlerChrysler Corporation as an inducement to the company to expand its business operations in Toledo, Ohio. They contend that the tax scheme discriminates against interstate commerce by granting preferential treatment to in-state investment and activity, in violation of the Commerce Clause of the United States Constitution and the Equal Protection Clause of the Ohio Constitution. After the defendants removed the action to federal court, the district court entered an order dismissing the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for failure to state a claim. Because we conclude that the investment tax credit runs afoul of the Commerce Clause, we can affirm only part of the district court's judgment.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In 1998, DaimlerChrysler entered into an agreement with the City of Toledo to construct a new vehicle-assembly plant near the company's existing facility in exchange for various tax incentives. DaimlerChrysler estimated that it would invest approximately $1.2 billion in this project, which would provide the region with several thousand new jobs. In return, the City and two local school districts agreed to give DaimlerChrysler a ten-year 100 percent property tax exemption, as well as an investment tax credit of 13.5 percent against the state corporate franchise tax for certain qualifying investments. The total value of the tax incentives was estimated to be $280 million.

Ohio's investment tax credit grants a taxpayer a nonrefundable credit against the state's corporate franchise tax if the taxpayer "purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in [Ohio]." Ohio Rev. Code Ann. § 5733.33(B)(1). The investment tax credit is generally 7.5 percent "of the excess of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county over the county average new manufacturing machinery and equipment investment for that county." *See* Ohio Rev. Code Ann. § 5733.33(C)(1). The rate increases to 13.5 percent of the cost of the new investment if it is purchased for use in specific economically depressed areas. *See* Ohio Rev. Code Ann. § 5733.33(C)(2), (A)(8)-(13). The credit may not exceed $1 million unless the taxpayer has increased its overall ownership of manufacturing equipment in the state during the year for which the credit is claimed. *See* Ohio Rev. Code Ann. § 5733.33(B)(2)(a). To the extent that the credit exceeds the corporation's total Ohio franchise tax liability in a particular year, the balance of the credit is carried forward



and can be used to reduce its liability in any of the three following years. *See* Ohio Rev.Code Ann. § 5733.33(D).

The personal property tax exemption is authorized under §§ 5709.62 and 5709.631; it permits municipalities to offer specified incentives to an enterprise that "agrees to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees" in economically depressed areas. Ohio Rev. Code Ann. § 5709.62(C)(1). An exemption may be granted "for a specified number of years, not to exceed ten, of a specified portion, up to seventy-five per cent, of the assessed value of tangible personal property first used in business at the project site as a result of the agreement." Ohio Rev. Code Ann. § 5709.62(C)(1)(a). The exemption may exceed 75 percent with consent of the affected school districts. *See* Ohio Rev. Code Ann. § 5709.62(D)(1).

The district court held that the investment tax credit and the property tax exemption do not violate the Commerce Clause because, although "an increase in activity in Ohio could increase the credit and exemption amount" under the two statutes, an increase in activity *outside* the state would not decrease the amount of the tax credit or exemption and therefore would not run afoul of the United States Supreme Court's ruling in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 400-01 (1984). From that decision, the plaintiffs now appeal.

## II. ANALYSIS

We review *de novo* a district court's order granting a motion to dismiss for failure to state a claim upon which relief may be granted. *See Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002). In considering a motion to dismiss pursuant to Rule 12(b)(6), all well-pleaded factual allegations of the complaint must be accepted as true and the complaint construed in the light most favorable to the plaintiffs. *Id.* It is

well-settled that dismissal of a complaint is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

On appeal, the plaintiffs' primary contention is that the Ohio statutes authorizing the investment tax credit and personal property tax exemption violate the Commerce Clause of the United States Constitution. Secondarily, the plaintiffs claim that the tax incentives violate Ohio's Equal Protection Clause.

**A. Commerce Clause Claim**

The United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States," U.S. Const. art. I, § 8, cl. 3, and the "negative" or "dormant" aspect of the Commerce Clause implicitly limits the State's right to tax interstate commerce. A tax provision satisfies the requirements of the Commerce Clause if (1) the activity taxed has a substantial nexus with the taxing State; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The parties do not dispute that the tax provisions at issue have a sufficient nexus with the state, are fairly apportioned, and are related to benefits provided by the state. Nor do the parties dispute that it is legitimate for Ohio to structure its tax system to encourage new intrastate economic activity. Indeed, the United States Supreme Court has indicated that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," nor does it



prevent a state from "compet[ing] with other States for a share of interstate commerce" so long as "no State [ ] discriminatorily tax[es] the products manufactured or the business operations performed in any other State." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336-37 (1977); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984) (the federal Commerce Clause "limits the manner in which States may legitimately compete for interstate trade"). Rather, the parties dispute whether Ohio's method for encouraging new economic investment—conferring investment tax incentives and property tax exemptions—discriminates against interstate commerce.

The United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes. The Court has made clear, however, that a tax statute's "constitutionality does not depend upon whether one focuses upon the benefited or the burdened party." *Bacchus Imports*, 468 U.S. at 273. The fact that a statute "discriminates against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax" is therefore legally irrelevant. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 404 (1984).

In general, a challenged credit or exemption will fail Commerce Clause scrutiny if it discriminates on its face or if, on the basis of "a sensitive, case-by-case analysis of purposes and effects," the provision "will in its practical operation work discrimination against interstate commerce," *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994) (citations omitted), by "providing a direct commercial advantage to local business." *Bacchus Imports*, 468 U.S. at 268 (citations omitted). " '[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't. of Envtl. Quality*, 511 U.S. 93, 99 (1994). A state tax provision that discriminates against interstate commerce is

invalid unless "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 101 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

**1. Investment Tax Credit**

Although the investment tax credit at issue here is equally available to in-state and out-of-state businesses, the plaintiffs nevertheless maintain that it discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. Specifically, any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere. Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

The plaintiffs' argument principally relies on the Supreme Court's own explanation of its Commerce Clause jurisprudence in cases invalidating tax schemes that encourage the development of local industry by imposing greater burdens on economic activity taking place outside the state. In *Boston Stock Exchange*, for example, the Supreme Court held unconstitutional amendments to New York's securities transfer tax that aimed to offset the competitive advantage that the transfer tax otherwise created for out-of-state exchanges that did not tax transfers. *See Boston Stock Exchange*, 429 U.S. at 323-24. Prior to the amendment, New York uniformly taxed in-state transfers of securities without regard to the place of



sale. *See id.* at 322. The amendment created a 50 percent reduction in the tax rate on transfers by nonresidents and limited liability on transfers of large blocks of shares as long as the sales were made in New York. *See id.* at 324. As a result, the amendment caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales. *See id.* at 330-31. The Court held that the reduction offended the Commerce Clause's anti-discrimination principle by converting a tax that was previously "neutral as to in-state and out-of-state sales" into one that which would induce a seller to trade through a New York broker in order to reduce its tax liability. *See id.* at 330-32. In doing so, New York effectively "foreclose[d] tax-neutral decisions" and "creat[ed] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." *Id.* at 331. The diversion of interstate commerce from the most economically efficient channels that resulted from New York's use of "its power to tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home state,'" *id.* at 336, (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)), was seen by the Court as "wholly inconsistent with the free trade purpose of the Commerce Clause."

Shortly thereafter, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Supreme Court reviewed a Louisiana statute that imposed a first-use tax on natural gas extracted from the continental shelf in an amount equivalent to the severance tax imposed on natural gas extracted in Louisiana. *See id.* at 731. Taxpayers subject to the first-use tax were entitled to a direct tax credit on any Louisiana Severance Tax owed in connection with the extraction of natural resources within the state. *See id.* at 732. Most Louisiana consumers of offshore gas were eligible for tax credits and exemptions, but the tax applied in full to offshore gas moving through and out of state. *See id.* at 733. Noting that the state severance tax credit "fa-

vor[ed] those who both own [offshore] gas and engage in Louisiana production" and that the "obvious economic effect of this Severance Tax Credit [was] to encourage natural gas owners involved in the production of [offshore] gas to invest in mineral exploration and development within Louisiana rather than to invest in further [offshore] development or in production in other States," the Court held that the statute "unquestionably discriminate[d] against interstate commerce in favor of local interests." *Id.* at 756-57.

In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), the Supreme Court invalidated a New York franchise tax that gave corporations an income tax credit based on the portion of their exports shipped from New York. Under the law, income from a subsidiary engaged exclusively in exports was to be combined with the income of its parent company for state tax purposes. *See id.* at 393. In an effort to provide an incentive to increase export activity in New York, the parent company was given a partially offsetting credit against income tax attributable to the subsidiary's income generated from New York exports. *See id.* Because the credit was based on the ratio of the subsidiary's New York exports to its income from all export shipments, a company's overall New York tax liability would decrease as exports from New York increased relative to exports from other states. Conversely, a company's New York tax liability increased when exports from New York decreased relative to exports from other states. *See id.* at 401. The Court found that the tax scheme "penalize[d] increases in the [export] shipping activities in other states," *id.* at 401, and that it was therefore a discriminatory tax that advantaged New York firms "by placing 'a discriminatory burden on commerce to its sister States.'" *Id.* at 406 (quoting *Boston Stock Exchange*, 429 U.S. at 331).

Analogizing to the provisions considered in *Boston Stock Exchange*, *Maryland v. Louisiana*, and *Westinghouse*, the plaintiffs argue that the investment tax credit at issue here



encourages the development of local business through the use of Ohio's "power to tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home State.' " *Boston Stock Exch.*, 429 U.S. at 336 (quoting *Bruce Church*, 397 U.S. at 145). Thus, they contend that like the tax credit in *Maryland v. Louisiana*, the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and that the result is to hinder free trade among the states. *Cf. Boston Stock Exch.*, 429 U.S. at 336.

The defendants maintain that the Supreme Court's opinions should be read narrowly to hold that tax incentives, like the Ohio tax credit, are permissible as long as they do not penalize out-of-state economic activity, citing Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 929 (1986) (elaborating upon and applying this distinction to the Court's precedents). In their view, the Commerce Clause is primarily concerned with preventing economic protectionism—that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce. According to their theory, the only tax credits and exemptions that would run afoul of the Commerce Clause fall into two categories: those that function like a tariff by placing a higher tax upon out-of-state business or products and those that penalize out-of-state economic activity by relying on both the taxpayer's in-state and out-of-state activities to determine the taxpayer's effective tax rate.

Although it is arguably possible to fit certain of the Supreme Court's cases into this framework, it is clear that the Court itself has not adopted this approach in analyzing dormant Commerce Clause cases, undoubtedly because it rests on the distinction between laws that benefit in-state activity and laws that burden out-of-state activity. Such a distinction is tenuous in light of the Court's acknowledgment that

"[v]irtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense." *Bacchus Imports*, 468 U.S. at 273. Indeed, economically speaking, the effect of a tax benefit or burden is the same. Moreover, the Court's command to examine the practical effect of challenged tax schemes suggests that "constitutionality [should] not depend upon whether one focuses upon the benefited or the burdened party." *Id.*; *see also Westinghouse*, 466 U.S. at 404 ("Nor is it relevant that New York discriminates against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax.").

Although the defendants liken the investment tax credit to a direct subsidy, which would no doubt have the same economic effect, the Court has intimated that attempts to create location incentives through the state's power to tax are to be treated differently from direct subsidies despite their similarity in terms of end-result economic impact. The majority in New Energy noted in dicta that subsidies do not "ordinarily run afoul of [the Commerce Clause]" because they are not generally "connect[ed] with the State's regulation of interstate commerce." *New Energy Co.*, 486 U.S. at 278; *see also West Lynn Creamery*, 512 U.S. at 199 n.15 ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that '[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." (quoting *New Energy Co.*, 486 U.S. at 278)). Thus, the distinction between a subsidy and a tax credit, in the constitutional sense, results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax.[1]

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[1] For further discussion of the constitutionality of coercive and non-coercive state regulation of interstate commerce through the state power to tax, see Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 806-09 (1996) (explaining the non-coercive nature of a similar tax exemption).



In short, while we may be sympathetic to efforts by the City of Toledo to attract industry into its economically depressed areas, we conclude that Ohio's investment tax credit cannot be upheld under the Commerce Clause of the United States Constitution.

**2. Personal Property Tax Exemption**

The plaintiffs maintain that the discriminatory characteristic of the City's personal property tax exemption rests not on the fact that only in-state property is eligible for exemption, but rather on the conditions that Ohio places on eligibility—conditions that require beneficiaries of the exemptions to agree to maintain a specified level of employment and investment in the state. The effect, they argue, is to subject two similarly situated owners of Ohio personal property to differential tax rates. A taxpayer who agrees to focus his employment or investment in Ohio receives preferential treatment in the form of a tax break, while a taxpayer who prefers to preserve the freedom to hire or invest elsewhere does not.

Although conditions imposed on property tax exemptions may independently violate the Commerce Clause, conditional exemptions raise no constitutional issues when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself. Stated differently, an exemption may be discriminatory if it requires the beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence. *Cf. Maryland*, 451 U.S. at 756-57 (finding unconstitutional a tax benefit that encouraged natural gas owners to invest in other forms of mineral exploration and development

within Louisiana rather than investing further in natural gas development outside the state). However, if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible.

Contrary to the plaintiffs' assertions, the conditions imposed on the receipt of the Ohio property tax exemption are minor collateral requirements and are directly linked to the use of the exempted personal property. The authorizing statute requires only an investment in new or existing property within an enterprise zone and maintenance of employees. *See* Ohio Rev. Code Ann. § 5709.62(C)(1). The statute does not impose specific monetary requirements, require the creation of new jobs, or encourage a beneficiary to engage in an additional form of commerce independent of the newly acquired property.[2] As a consequence, the conditions placed on eligibility for the exemption do not independently burden interstate commerce.

The cases on which the plaintiffs rely are inapplicable here, because they fail to address the question of whether conditions attached to the receipt of an exemption violate the anti-discrimination principle where the conditions themselves do not impose independent burdens upon commerce. In *Camps Newfound/Owatonna,Inc. v. Town of Harrison*, 520 U.S. 564 (1997), the Supreme Court reviewed a property tax exemption for charitable organizations that excluded organizations operated principally for the benefits of nonresidents and found the exemption unconstitutionally discriminatory because the effect of the statute was to "distinguish[ ] be-

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[2] Plaintiffs' assertion that the exemption, once received, coerces business into continual re-investment in Ohio in order to preserve the tax exemption is not persuasive. The exemption is project-specific and, therefore, a business does not lose its existing exemption by deciding to make its next investment elsewhere.



tween entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out [entities] that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business." *Id.* at 576. Similarly, the Fifth Circuit in *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910 (5th Cir. 1997), invalidated a tax exemption because it required beneficiaries to give a preference to in-state manufacturers, suppliers, and laborers. The Ohio provision at issue contains no restriction on the individuals employed or served. Therefore, the conditional character of the Ohio property tax exemption does not resemble characteristics of property tax exemptions found unconstitutional by previous courts.

Finally, the plaintiffs' argument regarding the effect of the exemption overlooks fundamental differences between tax credits and exemptions. Unlike an investment tax credit that reduces pre-existing income tax liability, the personal property exemption does not reduce any existing property tax liability. The exemption merely allows a taxpayer to avoid tax liability for new personal property put into first use in conjunction with a qualified new investment. Thus, a taxpayer's failure to locate new investments within Ohio simply means that the taxpayer is not subject to the state's property tax at all, and any discriminatory treatment between a company that invests in Ohio and one that invests out-of-state cannot be attributed the Ohio tax regime or its failure to reduce current property taxes. *See* Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 806-09 (1996) (explaining the non-coercive nature of a similar tax exemption). Additionally, the personal property tax exemption is internally consistent because, if universally applied, the new property would escape tax liability irrespective of location. Every new investment, no matter where undertaken,

would be exempt from a tax. Thus, businesses that desire to expand are neither discriminated against nor pressured into investing in Ohio. Accordingly, we hold that the Ohio personal property tax exemption does not violate the dormant Commerce Clause.

**B. State Equal Protection Claim**

The plaintiffs also challenged the investment tax credit and property tax exemption under the Equal Protection Clause of the Ohio Constitution, contending that the authorizing statutes "reflect a bias in favor of entrenched local interests that results in a discriminatory allocation of tax burdens and benefits." The district court found no equal protection violation based on a determination that both provisions were rationally related to a legitimate state interest in revitalizing economically troubled areas.

The Equal Protection Clauses of the Ohio and United States Constitutions impose identical limitations on government classification. *See Am. Ass'n of Univ. Professors v. Cent. State Univ.*, 717 N.E.2d 286, 291 (Ohio 1999) (rejecting an argument that the state equal protection clause imposes stricter analysis than the federal equal protection clause). Heightened review is triggered only if the classification "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 600 (Ohio 1994). Because the tax credit and the exemption provision classify on the basis of locality, a classification that is not inherently suspect, the tax incentives need only satisfy rational basis review.

Under rational basis review, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cent. State Univ.*, 717 N.E.2d at 290 (quoting *FCC v. Beach Communications, Inc.*,



508 U.S. 307, 313 (1993)). A rational relationship exists so long as "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *PICA Corp., Inc. v. Tracy*, 646 N.E.2d 206, 209 (Ohio Ct. App. 1994). The state, moreover, has no duty to produce legislative facts to sustain the rationality of a statutory classification. *Cent. State Univ.*, 717 N.E.2d at 290. A statute is presumed constitutional, and the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation omitted)).

The courts have recognized a state's legitimate interest in revitalizing economically troubled areas in order to eliminate problems frequently associated with urban blight. *See, e.g., Desenco, Inc. v. Akron*, 706 N.E.2d 323, 332 (Ohio 1999) (statutes that created economic development districts were rationally related to the state's legitimate interest in facilitating economic development, creating or preserving jobs, and improving the economic welfare of citizens); *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability.") (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, (1926)). The benefits conferred by the investment tax credit and property tax exemption are rationally related to this interest, given that their objective is to encourage businesses to relocate or expand existing facilities in central cities or areas that have high unemployment rates, significant low-income populations, or deteriorating buildings.

The plaintiffs argue nonetheless that granting tax incentives to a new domestic business but not nonresident businesses is not a legitimate purpose under Ohio's Equal Protection Clause. However, the cases cited in support of this argument lend little or no weight to the plaintiffs' position. In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 880 (1985), for example, the Court invalidated an Alabama stat-

ute that imposed a higher tax rate on insurance companies that were incorporated or maintained their principal place of business outside of Alabama, on the ground that the difference in treatment failed to advance a legitimate state interest. In so ruling, the Court held "that promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." *Id.* Thus, *Metropolitan Life* holds that a state may not impose a discriminatory tax in order to promote domestic industry solely based on nonresident status. The tax benefits under the Ohio statutes, however, are equally available to domestic and foreign corporations and classify corporations on the basis of new investment in economically depressed areas.

Likewise inapplicable are the cited opinions in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). In both cases, the Supreme Court struck down a county property tax assessment scheme that could not reasonably support the state's asserted legislative purpose. In *Allegheny*, the county tax assessor valued property based on the last sale price regardless of when it was last sold, providing only a modest increase in assessed value for properties that had not been recently transferred. *See id.* at 343. This practice resulted in gross disparities in the assessed value of comparable properties. The Court acknowledged that a "[s]tate may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," but it found no rational basis for the county's tax scheme whose asserted purpose was to "assess [ ] properties at true current value." *Id.* at 343-44. Similarly, the Court held in *Hooper* that a tax exemption classifying military veterans based solely on their period of residency within the state could not be rationalized by the state's interest in encouraging veterans to relocate to the state or in repaying veterans for their military service. 472 U.S. at 620-22.



By contrast, the classification in this case is clearly supported by facts that give rise to a legitimate state interest. In the equal protection context, a tax statute withstands constitutional scrutiny as long as the burden it imposes is found to be rationally related to that purpose. The purpose of the Ohio statutes—to encourage industrial development and economic stimulation of the state's economically troubled areas—clearly has a reasonable nexus to the tax provisions. Hence, we conclude that the plaintiffs have failed to demonstrate that the challenged tax incentives violate the Equal Protection Clause of the Ohio Constitution.

## III. CONCLUSION

For the reasons set out above, we REVERSE that portion of the district court's judgment upholding as constitutional the investment tax credit provision of Ohio Rev. Code Ann. § 5733.33, and we enjoin its enforcement. We AFFIRM the remaining portions of the district court's judgment.

United States District Court,
N.D. Ohio,
Western Division.

CHARLOTTE CUNO, ET AL.,
*Plaintiffs*,

v.

DAIMLERCHRYSLER, INC., ET AL.,
*Defendants*.

No. 3:00CV7247.

Aug. 1, 2001.

## MEMORANDUM OPINION

KATZ, District Judge.

This matter is before the Court on the Defendants' motions to dismiss (Doc. Nos. 51 & 52). Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1367. For the following reasons, Defendants' motions will be granted, and the case dismissed.

## BACKGROUND

The eighteen named plaintiffs in this action are challenging the legality of approximately $280,000,000 in tax benefits that were granted to Defendant DaimlerChrysler, Inc., to induce it to remain in Toledo, Ohio. On November 12, 1998, Defendants City of Toledo, Toledo Public School District, and Washington Local School District (collectively "the municipal Defendants")[1] entered into a Development Agreement

[1] Plaintiffs have also named as defendants Ohio State Treasurer Joseph T. Deters, Commissioner of the Ohio Department of Taxation Thomas M. Zaino, Director of the Department of Development of the State of Ohio C. Lee Johnson, and the State of Ohio (collectively the "State Defendants"), as well as Mayor of Toledo Carleton L. Finkbeiner.



with DaimlerChrysler whereby DaimlerChrysler received a ten-year exemption from taxes that otherwise would be levied on personal property first put into use at DaimlerChrysler's facility ("the property tax exemption"), and a credit against its state corporate franchise tax for certain qualifying investments ("the investment tax credit").

In Counts I and II of their second amended complaint, Plaintiffs allege that the Ohio statutory scheme permitting the property tax exemption, Ohio Rev. Code §§ 5709.62(C)(1) & 5709.631, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution. In Count III, Plaintiffs allege that even if Ohio Rev. Code §§ 5709.62(C)(1) & 5709.631 are constitutional, DaimlerChrysler was not qualified for the property tax exemption. In Counts IV and V, Plaintiffs allege that the Ohio statutory scheme permitting the investment tax credit, Ohio Rev. Code § 5733.33, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution.

Plaintiffs originally filed their complaint in the Lucas County, Ohio, Court of Common Pleas. Defendants removed the action pursuant to 28 U.S.C. § 1441, alleging federal question jurisdiction arising out of Plaintiffs' federal constitutional challenges to the statutes at issue. On November 11, 2000, this Court denied Plaintiffs' motion to remand.

The Defendants have filed motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[2] They contend that the Plaintiffs have failed to state a claim upon which relief may be granted under the Commerce Clause of the United States Constitution, the Equal Protec-

[2] One motion to dismiss was filed by DaimlerChrysler, the other by the remaining defendants.

tion Clause of the Ohio Constitution, or Article XII, Section 2 of the Ohio Constitution. Further, they claim that the Plaintiffs have failed to satisfy the statutory prerequisites to make a claim of violation of Ohio Rev. Code § 5709.62. Finally, they argue that Joseph T. Deters, Treasurer of the State of Ohio, is not a proper party to this suit, and that the Eleventh Amendment to the United States Constitution requires the dismissal of all state law claims brought against the state defendants. The Plaintiffs have filed responses as to each issue raised by the Defendants, and the Defendants have replied. The parties' contentions are discussed below.

## DISCUSSION

*I. Motion to Dismiss Standard*

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), while viewing the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The Court is without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Westlake*, *supra*, at 858. *See generally* 2 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE, § 12.34[1] (3d ed. 2001).

*II. Dismissals by Plaintiffs' Consent*

In their Memorandum in Opposition to the Defendants' Commerce Clause arguments, the Plaintiffs acknowledged that certain arguments made by the Defendants are well-founded. Accordingly, the following dismissals will be made



with the consent of the Plaintiffs and without further discussion:

1. Count III will be dismissed as to all Defendants;

2. Joseph T. Deters, Treasurer of the State of Ohio, will be dismissed as a Defendant with respect to all Counts of the Complaint;

3. The State of Ohio will be dismissed as a Defendant with respect to Counts I and IV;

4. Count II will be dismissed as to all Defendants to the extent that it rests on the claim that the property tax exemption does not fall within any of the categories enumerated in Article XII, § 2 of the Ohio Constitution.

*III. Eleventh Amendment Immunity*

The State Defendants argue that the sovereign immunity granted by the Eleventh Amendment to the United States Constitution requires dismissal of Counts II and V, in which the Plaintiffs allege that the tax credit and tax exemption violate the equal protection clause of the Ohio Constitution.[3] *See Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Plaintiffs object, and contend that this Court retains jurisdiction pursuant to *Ex Parte Young*, 209 U.S. 123 (1908), or, in the alternative, that the State Defendants have waived the protections of sover-

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[3] The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."

eign immunity by consenting to the removal of this case from state court.[4]

Neither of Plaintiffs' arguments are availing. *Ex Parte Young* is only available when a state official is sued in an effort to obtain injunctive relief for a violation of federal law, *see id.*, and the State Defendants have not objected to this Court's jurisdiction over any federal law claims (i.e. those in which the Plaintiffs allege that the tax credit and tax exemption violate the Commerce Clause). *Ex Parte Young* is not available where a State or state official asserts immunity to suit based on a state law (*i.e.*, the Plaintiffs' claims of violation of the equal protection clause of the Ohio Constitution).

The State Defendants have not waived their immunity through consent to removal. Sovereign immunity may be waived with state consent. *See Mixon v. Ohio*, 193 F.3d 389, 397 (6th Cir. 1999) (citing *Alden*, 527 U.S. 706, and *Seminole Tribe*, 517 U.S. 44). In *Mixon*, the Sixth Circuit stated, "Ohio has not waived its sovereign immunity in federal court." *Mixon*, 193 F.3d at 397. Furthermore, "Ohio *only* allows a waiver of sovereign immunity by its legislature or its courts." *Id.* at 397 n.7 (citing *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 460 (6th Cir. 1982)) (emphasis added). Neither the legislature nor the courts of Ohio have made such a waiver in this case.

[4] The state defendants suggest that, as an alternative to deciding the immunity question, this Court first proceed to the ultimate issue and then only return to immunity if the motion to dismiss would otherwise be denied. *See Parella v. Retirement Board of Rhode Island Employees' Ret. Sys.*, 173 F.3d 46 (1st Cir. 1999) (Eleventh Amendment not strictly jurisdictional and therefore may be bypassed for resolution of more simple legal issue). It appears that the Sixth Circuit has rejected this approach. *See Mixon v. Ohio*, 193 F.3d 389, 397 n.6 (6th Cir. 1999) ( "[W]e must address the [Eleventh Amendment] immunity issue because it is jurisdictional."), *citing Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996) ("[N]either the litigants' consent, nor oversight, nor convenience can justify a court's exercise of illegal power.").



The Plaintiffs contend that waiver was effected through consent to removal. To support this proposition, they point to Justice Kennedy's concurrence in *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393-98 (1998) (Kennedy, J., concurring), in which the Justice cast doubt upon the propriety of allowing a state to raise the issue of Eleventh Amendment immunity following consent to removal. Absent an otherwise divided Court, the concurring opinion of a single Justice bears only persuasive weight. Without further guidance from either the Sixth Circuit or the Supreme Court, this Court must hold that consent to removal, without more, does not act as a waiver of the sovereign immunity provided by the Eleventh Amendment. *See also Gwinn Area Comty. Sch. v. Michigan*, 741 F.2d 840, 847 (6th Cir. 1984) (consent to removal by state attorneys not a waiver absent legislative direction).

Because this case came before this Court through removal, it remains to be decided whether the claims for which the State Defendants have asserted immunity should be remanded to state court or dismissed without prejudice. The Sixth Circuit has held, "[T]he proper course is to direct the district court to remand these claims to the state court." *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 338 (6th Cir. 1990). The Defendants argue that the *Metropolitan Sewer* holding was cast into doubt by *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998). That argument is well-taken. In *Schacht*, the District Court for the Western District of Wisconsin dismissed the plaintiff's claims over which it lacked jurisdiction due to the state's assertion of the Eleventh Amendment. *See id.* at 385. On appeal, the Seventh Circuit vacated the judgment of the District Court; the judgment of the Seventh Circuit was vacated in turn by the Su-

preme Court. *See id.* at 393. Although the matter was not specifically addressed by the Court, it would appear that dismissal of the barred claims without prejudice was therefore the appropriate course. Since the Sixth Circuit has not reconsidered the issue of dismissal or remand in light of *Schacht*, this Court will dismiss without prejudice Counts II and V inasmuch as they are brought against the State Defendants.

*IV. Equal Protection Clause of the Ohio Constitution*

Although Counts II and V will be dismissed without prejudice with respect to the State Defendants, whether either or both Counts state a claim upon which relief may be granted must still be decided with respect to the remaining Defendants. As noted in Section III, *supra*, in Counts II and V the Plaintiffs allege that the property tax exemption and the investment tax credit violate the equal protection clause of the Ohio Constitution.[5] They claim that the exemption and credit "compel[ ] a conclusion of corporate favoritism." (Pl. Mem. Opp. Eq. Prot. at 15).

Both parties acknowledge that the Ohio and United States equal protection clauses impose identical limits on governmental classification. *See Kinney v. Kaiser Aluminum & Chem. Corp.*, 322 N.E.2d 880, 882 (Ohio 1975). The parties further agree that to withstand scrutiny a classification is only required to "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). It is the burden of the Plaintiffs in this case to "negative every conceivable basis

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[5] Article I, section 2 of the Ohio Constitution states, "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." Ohio Const. Art. I, § 2 (West 2001).



which might support" the challenged classification. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (quotation and citation omitted).

Review of both the exemption and the credit makes abundantly clear that the purpose of their enactment was to encourage industrial investment and development in Ohio, particularly in economically troubled areas.[6] This constitutes a legitimate state interest that clearly has a rational nexus to the exemption and the credit. *See, e.g., Nordlinger*, 505 U.S. at 12; *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959) ("[I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."). Even if that was not the intent of the legislature and the parties when the laws were enacted and the Development Agreement entered into, that such a reason is able to be articulated is enough. *See Nordlinger*, 505 U.S. at 28 (Thomas, J., concurring in part and concurring in judgment) ("Unless a classification involves suspect classes or fundamental rights, judicial scrutiny under the Equal Protection Clause demands only a conceivable rational basis for the challenged state distinction."). Although the Plaintiffs have submitted examples of a number of cases in which various tax measures were struck down as in violation of equal pro-

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[6] As pointed out by the Defendants, the Development Agreement states that the tax exemption is "in the vital and best interests of the City and the health, safety, morals, and welfare of its residents, and necessary for the purposes of carrying out the Stickney Urban Renewal Plan, elimination of blight and recurrence of blight and for the creation and preservation of jobs and employment opportunities; and to improve the economic welfare of the people of the City."

tection, none are on point with the current case. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Commission of Webster Cty., West Virginia*, 488 U.S. 336 (1989) (appraisal values may not be entirely arbitrary); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (tax may not be applied differently to domestic and foreign corporations where both are subject to tax); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985) (classification invalid when sole purpose was to favor long-term residents); *Bush v. Gore*, 531 U.S. 98 (2000) (suffrage case almost entirely unrelated to the instant case).

The Plaintiffs have failed to demonstrate that either the exemption or the credit violate the equal protection clause of the Ohio Constitution. Counts II and V will be dismissed.

*V. Commerce Clause of the United States Constitution*

In Counts I and IV, the Plaintiffs claim that the property tax exemption, authorized by Ohio Rev. Code §§ 5709.62(C)(1) & 5709.631, and the investment tax credit, authorized by Ohio Rev. Code § 5733.33, are unconstitutional because they violate the Commerce Clause of the United States Constitution. In addition to giving Congress the power "to regulate commerce . . . among the several States," U.S. Const., art. I, § 8, cl. 3, the Commerce Clause was crafted to "prohibit[ ] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (internal quotations and citations omitted).

To determine if a state tax violates the Commerce Clause, courts apply a four-part test. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A state tax violates the Commerce Clause if:

1. it lacks a "sufficient nexus with the State;"



2. it "discriminates against interstate commerce;"
3. it "is unfairly apportioned;" or
4. "it is unrelated to services provided by the State."

*See id.* at 277-78.

In the instant case, the parties do not appear to dispute that the exemption and credit at issue satisfy the "sufficient nexus," fairly apportioned, and service-related prongs of the *Complete Auto* test. The Plaintiffs do contend, however, that the exemption and credit run afoul of the Commerce Clause through discrimination against interstate commerce. This argument is without merit.

It is well-established that states are not precluded from enacting taxation schemes for the benefit of intrastate commerce and industry:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

*Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336-37 (1977); *see also Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 385 (1991) ("[It is] a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State."); *West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n.15 (1994) ("[I]t is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes."); *Hughes v. Alexandria Scrap Corp.*, 426

U.S. 794, 816 (1976) (Stevens, J., concurring) (suggesting that local industry may be encouraged through "cash subsidy, a tax credit, or a special privilege intended to attract investment capital"); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) (discussing possibility of "providing subsidies or other tax breaks to domestic industries").

As pointed out by the Defendants, there are two categories of taxation schemes that have been rejected by the Supreme Court. The first and most obvious is a system that acts as a "protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc.*, 512 U.S. at 193. Clearly, the property tax exemption at issue is not a tariff, since it applies only to property owned in the State of Ohio. If a potential taxpayer is unhappy with the effect of the exemption, it is free to relocate to another state and conduct all the business that it wishes without further consequence. Similarly, the investment tax credit is not akin to a tariff, since it does not burden in the slightest the transfer of goods in interstate commerce. Instead, it is available equally to businesses regardless of their initial location, so long as they increase the amount of their Ohio investment.

The second inappropriate scheme involves discriminatory taxation based on proportion of a business's activity that is carried on within a state as compared to business done in other states. The paradigmatic example of this type of scheme is the New York law found unconstitutional in *Westinghouse Elec. Co. v. Tully*, 466 U.S. 388 (1984). In *Westinghouse*, the Supreme Court addressed a New York law that taxed corporate income but returned a portion of that tax as a credit based on the proportion of total business activity conducted in New York. *Id.* at 393-94. This is similar to the credit and exemption schemes currently at issue here, since an increase in activity in Ohio could increase the credit and



exemption amount; however, the *Westinghouse* credit had one crucial difference: an increase in activity conducted outside New York would decrease the amount of the credit. *See id.* at 400-01. Such is obviously not the case here, where neither the credit nor the exemption varies with increased activity outside Ohio.

Notwithstanding Plaintiff's innovative arguments to the contrary, the property tax exemption and investment tax credit at issue here do not "discriminate against interstate commerce" in either of the well-established ways that would lead to invalidation under the Commerce Clause. Finding either scheme unconstitutional would therefore require this Court to violate the clear mandate of Supreme Court precedent, which is something, of course, that this Court will not do. Accordingly, Counts I and IV will be dismissed for failure to state a claim upon which relief may be granted.

## CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss (Doc. Nos. 51 & 52) will be granted, and the case dismissed.

IT IS SO ORDERED.

*JUDGMENT ENTRY*

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants' motions to dismiss (Doc. Nos. 51 & 52) are Granted;

FURTHER ORDERED that Counts II and V of the Complaint are Dismissed without prejudice as to Defendants Commissioner of the Ohio Department of Taxation Thomas M. Zaino, Director of the Department of Development of the State of Ohio C. Lee Johnson, and the State of Ohio;

FURTHER ORDERED that Counts II and V of the Complaint are Dismissed with prejudice with respect to Defendants Ohio State Treasurer Joseph T. Deters, Mayor of Toledo Carleton L. Finkbeiner, the City of Toledo, Toledo Public School District, Washington Local School District, and DaimlerChrysler, Inc.;

FURTHER ORDERED that Counts, I, III, and IV of the Complaint are dismissed with prejudice as to all Defendants.



No. 01-3960

United States Court of Appeals
For The Sixth Circuit

CHARLOTTE CUNO, ET AL.,
*Plaintiffs-Appellants,*

v.

DAIMLERCHRYSLER, INC., ET AL.,
*Defendants-Appellees.*

Filed: Jan. 18, 2005.

**ORDER**

Before: SILER, DAUGHTREY, and COLE, Circuit Judges.

The court having received three (3) petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

*/s/ LEONARD GREEN*
LEONARD GREEN, CLERK

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* Judge Sutton recused himself from participation in this ruling.

**Ohio Revised Code § 5733.33. Credit for purchase of new manufacturing machinery and equipment**

(A) As used in this section:

(1) "Manufacturing machinery and equipment" means engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing. "Manufacturing machinery and equipment" does not include property acquired after December 31, 1999, that is used:

(a) For the transmission and distribution of electricity;

(b) For the generation of electricity, if fifty per cent or more of the electricity that the property generates is consumed, during the one-hundred-twenty-month period commencing with the date the property is placed in service, by persons that are not related members to the person who generates the electricity.

(2) "New manufacturing machinery and equipment" means manufacturing machinery and equipment, the original use in this state of which commences with the taxpayer or with a partnership of which the taxpayer is a partner. "New manufacturing machinery and equipment" does not include property acquired after December 31, 1999, that is used:

(a) For the transmission and distribution of electricity;

(b) For the generation of electricity, if fifty per cent or more of the electricity that the property generates is consumed, during the one-hundred-twenty-month period commencing with the date the property is placed in service, by persons that are not related members to the person who generates the electricity.



(3)(a) "Purchase" has the same meaning as in section 179(d)(2) of the Internal Revenue Code.

(b) For purposes of this section, any property that is not manufactured or assembled primarily by the taxpayer is considered purchased at the time the agreement to acquire the property becomes binding. Any property that is manufactured or assembled primarily by the taxpayer is considered purchased at the time the taxpayer places the property in service in the county for which the taxpayer will calculate the county excess amount.

(c) Notwithstanding section 179(d) of the Internal Revenue Code, a taxpayer's direct or indirect acquisition of new manufacturing machinery and equipment is not purchased on or after July 1, 1995, if the taxpayer, or a person whose relationship to the taxpayer is described in subparagraphs (A), (B), or (C) of section 179(d)(2) of the Internal Revenue Code, had directly or indirectly entered into a binding agreement to acquire the property at any time prior to July 1, 1995.

(4) "Qualifying period" means the period that begins July 1, 1995, and ends December 31, 2015.

(5) "County average new manufacturing machinery and equipment investment" means either of the following:

(a) The average annual cost of new manufacturing machinery and equipment purchased for use in the county during baseline years, in the case of a taxpayer that was in existence for more than one year during baseline years.

(b) Zero, in the case of a taxpayer that was not in existence for more than one year during baseline years.

(6) "Partnership" includes a limited liability company formed under Chapter 1705 of the Revised Code or under the laws of any other state, provided that the company is not

classified for federal income tax purposes as an association taxable as a corporation.

(7) "Partner" includes a member of a limited liability company formed under Chapter 1705 of the Revised Code or under the laws of any other state, provided that the company is not classified for federal income tax purposes as an association taxable as a corporation.

(8) "Distressed area" means either a municipal corporation that has a population of at least fifty thousand or a county that meets two of the following criteria of economic distress, or a municipal corporation the majority of the population of which is situated in such a county:

(a) Its average rate of unemployment, during the most recent five-year period for which data are available, is equal to at least one hundred twenty-five per cent of the average rate of unemployment for the United States for the same period;

(b) It has a per capita income equal to or below eighty per cent of the median county per capita income of the United States as determined by the most recently available figures from the United States census bureau;

(c)(i) In the case of a municipal corporation, at least twenty per cent of the residents have a total income for the most recent census year that is below the official poverty line;

(ii) In the case of a county, in intercensal years, the county has a ratio of transfer payment income to total county income equal to or greater than twenty-five per cent.

(9) "Eligible area" means a distressed area, a labor surplus area, an inner city area, or a situational distress area.

(10) "Inner city area" means, in a municipal corporation that has a population of at least one hundred thousand and does not meet the criteria of a labor surplus area or a distressed area, targeted investment areas established by the municipal corporation within its boundaries that are comprised of the most recent census block tracts that individually have at least twenty per cent of their population at or below the state poverty level or other census block tracts contiguous to such census block tracts.



(11) "Labor surplus area" means an area designated as a labor surplus area by the United States department of labor.

(12) "Official poverty line" has the same meaning as in division (A) of section 3923.51 of the Revised Code.

(13) "Situational distress area" means a county or a municipal corporation that has experienced or is experiencing a closing or downsizing of a major employer, that will adversely affect the county's or municipal corporation's economy. In order to be designated as a situational distress area for a period not to exceed thirty-six months, the county or municipal corporation may petition the director of development. The petition shall include written documentation that demonstrates all of the following adverse effects on the local economy:

(a) The number of jobs lost by the closing or downsizing;

(b) The impact that the job loss has on the county's or municipal corporation's unemployment rate as measured by the state director of job and family services;

(c) The annual payroll associated with the job loss;

(d) The amount of state and local taxes associated with the job loss;

(e) The impact that the closing or downsizing has on the suppliers located in the county or municipal corporation.

(14) "Cost" has the same meaning and limitation as in section 179(d)(3) of the Internal Revenue Code.

(15) "Baseline years" means:

(a) Calendar years 1992, 1993, and 1994, with regard to a credit claimed for the purchase during calendar year 1995, 1996, 1997, or 1998 of new manufacturing machinery and equipment;

(b) Calendar years 1993, 1994, and 1995, with regard to a credit claimed for the purchase during calendar year 1999 of new manufacturing machinery and equipment;

(c) Calendar years 1994, 1995, and 1996, with regard to a credit claimed for the purchase during calendar year 2000 of new manufacturing machinery and equipment;

(d) Calendar years 1995, 1996, and 1997, with regard to a credit claimed for the purchase during calendar year 2001 of new manufacturing machinery and equipment;

(e) Calendar years 1996, 1997, and 1998, with regard to a credit claimed for the purchase during calendar year 2002 of new manufacturing machinery and equipment;

(f) Calendar years 1997, 1998, and 1999, with regard to a credit claimed for the purchase during calendar year 2003 of new manufacturing machinery and equipment;

(g) Calendar years 1998, 1999, and 2000, with regard to a credit claimed for the purchase during calendar year 2004 of new manufacturing machinery and equipment;

(h) Calendar years 1999, 2000, and 2001, with regard to a credit claimed for the purchase during calendar year 2005 of new manufacturing machinery and equipment;

(i) Calendar years 2000, 2001, and 2002, with regard to a credit claimed for the purchase during calendar year 2006 of new manufacturing machinery and equipment;



(j) Calendar years 2001, 2002, and 2003, with regard to a credit claimed for the purchase during calendar year 2007 of new manufacturing machinery and equipment;

(k) Calendar years 2002, 2003, and 2004, with regard to a credit claimed for the purchase during calendar year 2008 of new manufacturing machinery and equipment;

(l) Calendar years 2003, 2004, and 2005, with regard to a credit claimed for the purchase during calendar year 2009 of new manufacturing machinery and equipment;

(m) Calendar years 2004, 2005, and 2006, with regard to a credit claimed for the purchase during calendar year 2010 of new manufacturing machinery and equipment;

(n) Calendar years 2005, 2006, and 2007, with regard to a credit claimed for the purchase during calendar year 2011 of new manufacturing machinery and equipment;

(o) Calendar years 2006, 2007, and 2008, with regard to a credit claimed for the purchase during calendar year 2012 of new manufacturing machinery and equipment;

(p) Calendar years 2007, 2008, and 2009, with regard to a credit claimed for the purchase during calendar year 2013 of new manufacturing machinery and equipment;

(q) Calendar years 2008, 2009, and 2010, with regard to a credit claimed for the purchase during calendar year 2014 of new manufacturing machinery and equipment;

(r) Calendar years 2009, 2010, and 2011, with regard to a credit claimed for the purchase during calendar year 2015 of new manufacturing machinery and equipment.

(16) "Related member" has the same meaning as in section 5733.042 of the Revised Code.

(B)(1) Subject to division (I) of this section, a nonrefundable credit is allowed against the tax imposed by section 5733.06

of the Revised Code for a taxpayer that purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in this state no later than December 31, 2016.

(2)(a) Except as otherwise provided in division (B)(2)(b) of this section, a credit may be claimed under this section in excess of one million dollars only if the cost of all manufacturing machinery and equipment owned in this state by the taxpayer claiming the credit on the last day of the calendar year exceeds the cost of all manufacturing machinery and equipment owned in this state by the taxpayer on the first day of that calendar year.

As used in division (B)(2)(a) of this section, "calendar year" means the calendar year in which the machinery and equipment for which the credit is claimed was purchased.

(b) Division (B)(2)(a) of this section does not apply if the taxpayer claiming the credit applies for and is issued a waiver of the requirement of that division. A taxpayer may apply to the director of development for such a waiver in the manner prescribed by the director, and the director may issue such a waiver if the director determines that granting the credit is necessary to increase or retain employees in this state, and that the credit has not caused relocation of manufacturing machinery and equipment among counties within this state for the primary purpose of qualifying for the credit.

(C)(1) Except as otherwise provided in division (C)(2) and division (I) of this section, the credit amount is equal to seven and one-half per cent of the excess of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county over the county average new manufacturing machinery and equipment investment for that county.



(2) Subject to division (I) of this section, as used in division (C)(2) of this section "county excess" means the taxpayer's excess cost for a county as computed under division (C)(1) of this section.

Subject to division (I) of this section, a taxpayer with a county excess, whose purchases included purchases for use in any eligible area in the county, the credit amount is equal to thirteen and one-half per cent of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in the eligible areas in the county, provided that the cost subject to the thirteen and one-half per cent rate shall not exceed the county excess. If the county excess is greater than the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in eligible areas in the county, the credit amount also shall include an amount equal to seven and one-half per cent of the amount of the difference.

(3) If a taxpayer is allowed a credit for purchases of new manufacturing machinery and equipment in more than one county or eligible area, it shall aggregate the amount of those credits each year.

(4) The taxpayer shall claim one-seventh of the credit amount for the tax year immediately following the calendar year in which the new manufacturing machinery and equipment is purchased for use in the county by the taxpayer or partnership. One-seventh of the taxpayer credit amount is allowed for each of the six ensuing tax years. Except for carried-forward amounts, the taxpayer is not allowed any credit amount remaining if the new manufacturing machinery and equipment is sold by the taxpayer or partnership or is transferred by the taxpayer or partnership out of the county before the end of the seven-year period unless, at the time of the sale or transfer, the new manufacturing machinery and equipment has been fully depreciated for federal income tax purposes.

(5)(a) A taxpayer that acquires manufacturing machinery and equipment as a result of a merger with the taxpayer with whom commenced the original use in this state of the manufacturing machinery and equipment, or with a taxpayer that was a partner in a partnership with whom commenced the original use in this state of the manufacturing machinery and equipment, is entitled to any remaining or carried-forward credit amounts to which the taxpayer was entitled.

(b) A taxpayer that enters into an agreement under division (C)(3) of section 5709.62 of the Revised Code and that acquires manufacturing machinery or equipment as a result of purchasing a large manufacturing facility, as defined in section 5709.61 of the Revised Code, from another taxpayer with whom commenced the original use in this state of the manufacturing machinery or equipment, and that operates the large manufacturing facility so purchased, is entitled to any remaining or carried-forward credit amounts to which the other taxpayer who sold the facility would have been entitled under this section had the other taxpayer not sold the manufacturing facility or equipment.

(c) New manufacturing machinery and equipment is not considered sold if a pass-through entity transfers to another pass-through entity substantially all of its assets as part of a plan of reorganization under which substantially all gain and loss is not recognized by the pass-through entity that is transferring the new manufacturing machinery and equipment to the transferee and under which the transferee's basis in the new manufacturing machinery and equipment is determined, in whole or in part, by reference to the basis of the pass-through entity which transferred the new manufacturing machinery and equipment to the transferee.

(d) Division (C)(5) of this section shall apply only if the acquiring taxpayer or transferee does not sell the new manufacturing machinery and equipment or transfer the new manufacturing machinery and equipment out of the county



before the end of the seven-year period to which division (C)(4) of this section refers.

(e) Division (C)(5)(b) of this section applies only to the extent that the taxpayer that sold the manufacturing machinery or equipment, upon request, timely provides to the tax commissioner any information that the tax commissioner considers to be necessary to ascertain any remaining or carried-forward amounts to which the taxpayer that sold the facility would have been entitled under this section had the taxpayer not sold the manufacturing machinery or equipment. Nothing in division (C)(5)(b) or (e) of this section shall be construed to allow a taxpayer to claim any credit amount with respect to the acquired manufacturing machinery or equipment that is greater than the amount that would have been available to the other taxpayer that sold the manufacturing machinery or equipment had the other taxpayer not sold the manufacturing machinery or equipment.

(D) The taxpayer shall claim the credit in the order required under section 5733.98 of the Revised Code. Each year, any credit amount in excess of the tax due under section 5733.06 of the Revised Code after allowing for any other credits that precede the credit under this section in that order may be carried forward for three tax years.

(E) A taxpayer purchasing new manufacturing machinery and equipment and intending to claim the credit shall file, with the department of development, a notice of intent to claim the credit on a form prescribed by the department of development. The department of development shall inform the tax commissioner of the notice of intent to claim the credit.

(F) The director of development shall annually certify, by the first day of January of each year during the qualifying period, the eligible areas for the tax credit for the calendar

year that includes that first day of January. The director shall send a copy of the certification to the tax commissioner.

(G) New manufacturing machinery and equipment for which a taxpayer claims the credit under section 5733.31, 5733.311, 5747.26, or 5747.261 of the Revised Code shall not be considered new manufacturing machinery and equipment for purposes of the credit under this section.

(H)(1) Notwithstanding sections 5733.11 and 5747.13 of the Revised Code, but subject to division (H)(2) of this section, the tax commissioner may issue an assessment against a person with respect to a credit claimed under this section for new manufacturing machinery and equipment described in division (A)(1)(b) or (2)(b) of this section, if the machinery or equipment subsequently does not qualify for the credit.

(2) Division (H)(1) of this section shall not apply after the twenty-fourth month following the last day of the period described in divisions (A)(1)(b) and (2)(b) of this section.

(I) Notwithstanding any other provision of this section to the contrary, in the case of a qualifying controlled group, the credit available under this section to a taxpayer or taxpayers in the qualifying controlled group shall be computed as if all corporations in the group were a single corporation. The credit shall be allocated to such a taxpayer or taxpayers in the group in any amount elected for the taxable year by the group. Such election shall be revocable and amendable during the period described in division (B) of section 5733.12 of the Revised Code.

This division applies to all purchases of new manufacturing machinery and equipment made on or after January 1, 2001, and to all baseline years used to compute any credit attributable to such purchases; provided, that this division may be applied solely at the election of the qualifying controlled group with respect to all purchases of new manufacturing machinery and equipment made before that date, and



to all baseline years used to compute any credit attributable to such purchases. The qualifying controlled group at any time may elect to apply this division to purchases made prior to January 1, 2001, subject to the following:

(1) The election is irrevocable;

(2) The election need not accompany a timely filed report, but the election may accompany a subsequently filed but timely application for refund, a subsequently filed but timely amended report, or a subsequently filed but timely petition for reassessment.

(2) (2)

Nos. 04-1704 and 04-1724

Supreme Court, U.S.
FILED
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# In The Supreme Court of the United States

DAIMLERCHRYSLER CORP., et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

AND

WILLIAM W. WILKINS, Tax Commissioner etc., et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

**On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENTS' BRIEF IN RESPONSE TO PETITIONS FOR *CERTIORARI*

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## QUESTION PRESENTED

Was the Sixth Circuit correct in finding that a state investment tax credit, which provides tax benefits only to those taxpayers who locate new capital investments in the state, violates the Commerce Clause's prohibition on discriminatory tax provisions because the law provides preferential tax treatment that favors in-state economic activity?

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## INTRODUCTION

These petitions address one portion of a case in which the Sixth Circuit reviewed the constitutionality of two different tax incentives authorized by the State of Ohio and used to encourage DaimlerChrysler Corporation to locate a new manufacturing facility in Ohio. The Sixth Circuit found that Ohio's investment tax credit ("ITC") violated the Commerce Clause, while concluding that its conditional exemption from personal property taxes did not.

Like the State of Ohio, Respondents believe it would be advisable for the Court to review both aspects of this important case, and therefore, we do not oppose the instant Petitions. The two tax incentives challenged in this litigation are both designed to offer preferential treatment to corporate taxpayers who choose to locate substantial new investments in the state of Ohio. Both discriminate, although in somewhat different ways, in favor of businesses that commit to expanded economic activity in Ohio and against those who do not make such commitments. Thus, the two aspects of the case raise closely related questions about the scope of the Commerce Clause's prohibition on discriminatory state tax provisions, and review of the two aspects together would allow the Court to shed useful light on the proper application of the Commerce Clause in both contexts.

Respondents agree, in particular, with Petitioners' assertions concerning the great practical importance of the outcome of this case. Tax incentives similar to Ohio's ITC and its conditional property tax exemptions are deployed by virtually every state, and the impacts on state and local revenues and on the distribution of the costs of government among different classes of taxpayers are dramatic.

Moreover, the proliferation of state and local tax incentives designed to shape business location decisions has gone a long way to fragment the "national 'common market,'" *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977), which the Commerce Clause seeks to preserve.

With regard to the merits of the case, Respondents disagree, not only with Petitioners' view that the Sixth Circuit's decision concerning Ohio's ITC was mistaken, but also with Petitioners' claims about the novelty and complexity of the issues presented. Indeed, as we discuss below, the Sixth Circuit's analysis of Ohio's ITC follows straightforwardly from a long line of this Court's decisions striking down discriminatory tax provisions that provide "a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Nonetheless, particularly in light of the need to review the Sixth Circuit's problematic application of Commerce Clause principles to Ohio's conditional property tax exemption, *see* Petition for Writ of Certiorari in No. 04-1407 ("Cuno Petition") at 9-16, Respondents agree that clarification by this Court of the full set of issues presented by this case would advance important Commerce Clause goals.

## STATEMENT OF THE CASE

Respondents generally concur with Petitioners' Statements of the Case. Only a few points warrant brief clarification.

First, the Petitioners in 04-1724 ("State Pet.") aver, without any citation, that investment tax credits "have

previously been understood as . . . acceptable." State Pet. at 3. While it is certainly true that such credits have been widely adopted among the States, it is likewise the case that the Sixth Circuit's ruling, finding such credits in violation of the Commerce Clause, had long been anticipated by many students of state and local tax policy. *See, e.g.*, Walter Hellerstein & Daniel T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 817-18 (1996); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 434-37 (1996); Robert D. Plattner, *State Business Tax Incentives: Are They Vulnerable to Constitutional Attack*, 2000 STATE TAX TODAY 128-19 (July 3, 2000); *cf. State Tax Advisory Board Focuses on High Court Developments, Nexus, and More During October 1995 Roundtable*, 56 ST. TAX. REP. (CCH) No. 49, at 8, 9-10 (Dec. 4, 1995) (reporting the recognition by a panel of leading state tax practitioners of the Commerce Clause difficulties facing business tax incentives). The Sixth Circuit's decision, while significant in its impact, was far from surprising or revolutionary.

Second, the State Petitioners, in explaining the methodology employed in calculating the portion of a multistate business's income that is subject to Ohio tax, describe Ohio's three-factor formula as reflecting the common approach characterized by this Court as "something of a benchmark." State Pet. at 8 (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983)). But Petitioners fail to mention an important respect in which Ohio's approach departs from the "benchmark" methodology, which equally weights the three factors (property, payroll, and sales). Ohio's approach, by contrast,

assigns the sales factor three times the weight of each of the other factors. *See* Ohio Rev. Code § 5733.05(B)(2). The consequence of this triple weighting of the sales factor is that the attribution of a taxpayer's income to Ohio is determined predominantly on the basis of where its sales are located, a factor unlikely to be significantly affected by a plant location decision. Thus, contrary to Petitioners' speculations, there is likely to be at most a quite modest increase in a taxpayer's Ohio tax liability due to location of a new plant in the state, an increase far smaller than the tax reduction due to Ohio's ITC. And the scale of any tax increase because of the new investment will be still smaller in a case like the present one where the new plant is a replacement for an existing facility in Ohio.

Finally, it is noteworthy that both Petitioners, in their descriptions of the Sixth Circuit's decision, omit any reference to the centerpiece of the court's explanation of how Ohio's ITC violates the Commerce Clause by discriminating between in-state and out-of-state economic activity. Instead, both Petitions focus on a more general phrase (concerning measures whose "economic effect . . . is to encourage further investment in-state at the expense of development in other states") used at one point in the court's discussion, in an effort to suggest that the Sixth Circuit's approach is overbroad. *See* Petition of Daimler-Chrysler Corp., No. 04-1704, at 6; State Pet. at 13. Overlooked is the court's careful description of the specifically discriminatory features that render Ohio's ITC unconstitutional, DaimlerChrysler Pet. App. at 6a:

> Specifically, any corporation currently doing business in Ohio, and therefore paying the state's

> corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere. Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

The question addressed by the Sixth Circuit, and the important question to be reviewed by this Court, is whether tax provisions with such an explicitly discriminatory design and effect can withstand Commerce Clause scrutiny.

## DISCUSSION

### A. The decision below involves a recurring issue of great practical importance.

Respondents concur that the issues raised by this case are of broad national importance, because they will apply to a range of comparable business tax incentives offered by many states. Indeed, it has never been Respondents' intention to single out Ohio's incentive programs as distinctively problematic, nor to place Ohio (or the Sixth Circuit states) at a competitive disadvantage vis a vis the rest of the nation. Instead, Respondents anticipate that a clear statement of the unconstitutionality of discriminatory state tax incentives will free all the states from the

necessity of engaging in an escalating competition over incentives that deprives all of them of needed revenues, while gaining a meaningful competitive advantage for none.

At present, as Petitioners document, investment tax credits, closely comparable to the Ohio program struck down by the Sixth Circuit, are deployed by a substantial majority of the states, and virtually every state with a tax on corporate income offers some variety of credit based on the in-state location of specific forms of economic activity. *See* State Pet. at 22 n.5 (thirty-seven states have ITCs); DaimlerChrysler Pet. at 8-9. Likewise, property tax exemptions that are conditioned on in-state economic activity beyond the investment in the exempted property itself, like the Ohio provision challenged in the Cuno Petition, are an increasingly common feature of state tax systems. *See* Cuno Pet. at 16-17.

Nationally, the impact of these tax breaks on state and local revenues are dramatic. As the State Petitioners observe, the annual cost of ITCs in a handful of states for which estimates were available comes to $844 million, *see* State Pet. at 25, while it is estimated that the annual costs of just one state's property tax exemption program will exceed $400 million by 2008, *see* TEXAS TAX EXPENDITURE AND INCIDENCE REPORT 2005-2007, Table 1 at 36 (2003). The inevitable result is a significant shift of the costs of state and local government to other classes of taxpayers, like Respondents here, and a substantial reduction in states' and localities' ability to deliver important public services. *See, e.g.*, Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 2002 STATE TAX TODAY 42-1 (March 4, 2002); Robert Tomsho, *In Toledo, A*

*Tension Between School Funds and Business Breaks*, WALL ST. J., July 18, 2001 at A1.

While Respondents generally agree with Petitioners about the great practical importance of the Sixth Circuit's ruling, Petitioners' concerns about the impact of the Sixth Circuit's decision on the ability of states to compete effectively for business investment and jobs are groundless. Indeed, econometric studies have repeatedly demonstrated that the actual influence of state and local tax incentives on business location decisions are, at most, marginal, both because of the small size of state and local taxes relative to other business costs and because competing jurisdictions all offer competing incentives. *See, e.g.*, Robert G. Lynch, RETHINKING GROWTH STRATEGIES (2004) 25-36; California Legislative Analyst's Office, *An Overview of California's Manufacturers' Investment Credit* 11 (Oct. 2002). As former Treasury Secretary and former Alcoa chief executive Paul O'Neill explains, "As a businessman I never made an investment decision based on the tax code. . . . If you give money away I will take it, but good business people don't do things because of inducements." Joseph Kahn, *Treasury Choice Varies from Bush on Tax Outlook*, N.Y. TIMES, Jan. 18, 2001 at A-1, A-16.

Nor is there reason to fear, as Petitioners argue, that the Sixth Circuit's decision places the state of Ohio, or the other states in the Circuit, at a significant competitive disadvantage relative to other states. *See* State Pet. at 22-24; DaimlerChrysler Pet. at 10-11. Not only is there no evidence that investment tax credits like Ohio's are significant factors in business location decisions, but in any case, as Petitioners acknowledge, the decision below has cast a "cloud of uncertainty," *id.* at 9, over the comparable incentives offered by other states, and the incentives

offered by other states could only be influential "if businesses, *improbably*, disregard that uncertainty and rely on those incentives." *Id.* at 10 (emphasis added). Unsurprisingly, and notwithstanding the concerns raised in the State's Petition, Ohio's Governor continues to issue a steady stream of press releases touting new businesses and jobs that the state has been able to attract. *See, e.g.*, *Taft Applauds Federal Grant for Lima*, available at http://governor.ohio.gov/releases/072205Lima.htm (July 22, 2005) (discussing federal and state incentives used to secure ethanol production facility); *Taft Visits LORD Corporation to Celebrate Dayton Facility Expansion*, available at http://governor.ohio.gov/releases/072005LORD Corp.htm (July 20, 2005).

### B. The Sixth Circuit's finding that Ohio's ITC is unconstitutional follows directly from this Court's well-established Commerce Clause jurisprudence and should be affirmed.

The central concern of the Commerce Clause is "to avoid the tendencies toward economic Balkanization that had plagued the relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).[1] Accordingly, this Court has long enforced an "anti-discrimination

[1] *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) ("to keep the commercial intercourse among the States free from all invidious and partial restraints") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in judgment)); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) ("the very purpose of the Commerce Clause was to create an area of free trade among the several states") (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

principle," *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), barring "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). The Sixth Circuit's decision striking down Ohio's ITC is a straightforward application of this important and well-established principle.

As the Sixth Circuit explained, if an Ohio taxpayer locates a substantial new investment in plant and equipment within the state, it will benefit from a reduction in its Ohio franchise tax, whereas, if it locates the same investment elsewhere, it will continue to bear the full burden of Ohio taxation. *See* DaimlerChrysler Pet. App. at 6a. Thus, "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden . . . while a competitor that invests out-of-state will face a comparatively higher tax burden. . . . " *Id.* This is, of course, precisely the end that the ITC is intended to achieve, favoring those businesses that choose to locate their facilities within the state and thereby also favoring the other in-state economic interests (employees, suppliers, etc.) who benefit from in-state facilities. And the ITC unquestionably achieves this end by discriminating in its treatment of otherwise identically situated business taxpayers, based solely on the in-state or out-of-state location of their investments.

Petitioners face a daunting task in attacking the Sixth Circuit's analysis. They are unable to point to a single case among this Court's numerous decisions applying the Commerce Clause's anti-discrimination principle in which the Court has upheld a measure that provided preferential

tax treatment conditioned upon in-state economic activity. In the absence of supportive case law, they instead seek to offer a restrictive reading of the Court's prior cases and discussions which will allow them to distinguish Ohio's ITC from the numerous provisions offering preferences for in-state activity which the Court has previously invalidated. The distinctions that they attempt to draw, however, can neither account for the full range of the Court's prior decisions, nor make sense of the Court's repeated explanations of its consistent prohibition against measures that "provid[e] a direct commercial advantage" to in-state business activity. *E.g., Maryland v. Louisiana*, 451 U.S. at 754; *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

For example, Petitioners suggest that the Commerce Clause serves only to prohibit protectionist measures that shelter existing in-state interests from competition from interstate businesses, and not to reach measures which encourage out-of-state actors to direct their economic activity into the state. *See* DaimlerChrysler Pet. at 22-23; State Pet. at 20-21. But, while many of this Court's anti-discrimination cases have addressed such protectionist measures, the Court has never suggested the limitation asserted by Petitioners. On the contrary, the Court has repeatedly condemned measures as discriminatory precisely because they provided incentives for out-of-state businesses to locate their activities within the state. *See, e.g., Maryland v. Louisiana*, 451 U.S. at 756-57 (striking down credit because its "obvious economic effect . . . is to encourage natural gas owners . . . to invest in mineral exploration and development within Louisiana rather than invest in other States"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (invalidating a measure

because it "encourages an out-of-state operator to become a resident in order to compete on equal terms"). As the Court has emphasized, "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce . . . within the State than to assure that residents trade only in intrastate commerce." *Boston Stock Exchange*, 429 U.S. at 334-35.

In a similar vein, Petitioners contend that the Court's cases striking down state tax measures as discriminatory are confined to two clusters of situations – tariff-like measures that tax out-of-state goods or services, but not their in-state equivalents, and measures that penalize out-of-state activity by increasing taxes on the basis of such activity. *See* State Pet. at 19-20; DaimlerChrysler Pet. at 19, 22-24. Petitioners' suggestion is that a measure, like Ohio's ITC, which favors in-state activity by providing a selective benefit based on such activity, and not by imposing special burdens on out-of-state activity, does not run afoul of the Commerce Clause's anti-discrimination principle.

This bifurcated categorization of the case law had its origins in a 1986 law review article, written to contain the implications of the Court's rapidly expanding body of anti-discrimination tax cases, and particularly of the 1984 decision in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Philip Tatarowicz & Rebecca Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986); *cf.* Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 STATE TAX NOTES 189 (2005) (applying the Tatarowicz/Mims-Velarde framework). But the Sixth Circuit was right, *see* DaimlerChrysler Pet. App. at 9a-10a, to reject

this attempted compartmentalization of the Court's anti-discrimination jurisprudence, because it can account neither for the Court's explanations of its reasoning nor for a number of its decisions. *See also* Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 813-15 (1996) (concluding that the Tatarowicz/Mims-Velarde framework fails to provide a satisfactory account of either the Court's reasoning or its decisions).

Petitioners' proposed framework depends on a crucial distinction between provisions that increase taxpayers' burdens due to out-of-state activity and those that merely diminish burdens on account of in-state activity. But Defendants are unable to cite a single case in which the Court has deployed such a distinction. On the contrary, the Court has expressly, and quite sensibly, disavowed any meaningful distinction, for anti-discrimination purposes, between tax benefits and burdens:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984).[2]

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[2] *See also Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 404 (1984) ("Nor is it relevant that New York discriminates . . . by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical.")

Both Petitioners and Tatarowicz and Mims-Velarde themselves seek to deploy their analytic schema to limit the impact of the Court's holding in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), which found unconstitutional New York's corporate income tax credits that were measured by the extent of the taxpayer's export activities conducted in New York. As they emphasize, the *Westinghouse* Court observed that the scheme invalidated there, not only increased the credits as activity in New York increased, but also decreased the credits as activity elsewhere expanded, a feature that the Court described as the credit's "most pernicious feature." *Id.* at 401 n.9. But a thorough reading of the Court's opinion makes clear that this feature of the New York provision was not, as Petitioners insist, essential to the Court's ruling. In fact, the Court focused primarily on the benefits provided for New York activity, describing the provision as "an attempt to 'provide a positive incentive for increased business activity in New York.'" *Westinghouse*, 466 U.S. at 393. And when the Court offered three detailed examples of the workings of the credit, each intended to show the discriminatory effects of the provision, only the last of the three exemplified the "penalty" effect, while the other two focused instead on the benefits that result from increasing in-state activity. *Id.* at 401 n.9. As prominent scholars have observed, "The clear thrust of the opinion was that any provision that reduces the taxpayer's 'effective [in-state] tax rate' as the taxpayer engages in more in-state activity violates the Commerce Clause." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 815 (citations omitted). Even *Westinghouse* does not fit the Tatarowicz/Mims-Velarde framework.

Nor can their categorization accommodate a number of the Court's other anti-discrimination decisions. For example, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court struck down several aspects of Louisiana's tax on the transportation in Louisiana of off-shore natural gas, including a credit provision allowing taxpayers to use the tax on off-shore gas to reduce severance taxes on (unrelated) in-state mineral extraction. As the Court explained, the discriminatory feature of this provision was not any penalty imposed on out-of-state operations, but rather the benefit it provided for in-state activity and the resultant incentive "to invest in mineral exploration and development within Louisiana rather than invest in other States." *Id.* at 756-57. Other examples that cannot be accommodated within the Tatarowicz/Mims-Velarde framework include *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987) (striking down Pennsylvania's flat-rate axle tax because it has the effect of favoring businesses using their trucks exclusively in-state) and *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (invalidating a Maine property tax exemption restricted to charitable organizations providing the bulk of their services to in-state residents). The simple fact is that the Court's consistent approach has been to invalidate measures that are structured to favor in-state over out-of-state activity, without regard to whether the discrimination is achieved by providing a benefit for in-state activity or a burden on out-of-state alternatives.

Petitioners seek to reinforce their artificial narrowing of the Court's anti-discrimination case law by suggesting that, outside the narrow confines of their framework, the Court ordinarily endorses and approves state efforts to influence business location through tax policies. *See*

DaimlerChrysler Pet. at 16-18; State Pet. at 16. In fact, however, there is no body of Supreme Court case law upholding state tax measures on such grounds. On the contrary, in case after case, the Court has struck down tax provisions precisely because they attempt to steer business activities to a particular state. *See, e.g.*, *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977) (holding that efforts to divert interstate commerce are "wholly inconsistent with the free trade purpose of the Commerce Clause"); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 401 (1984) (noting that in "both *Maryland v. Louisiana* and *Boston Stock Exchange*, the Court struck down state tax statutes that encouraged the development of local industry"); *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994) (explaining the Commerce Clause as directed toward the avoidance of "distorting effects on the geography of production").

In the absence of supportive case law, Petitioners focus on scattered dicta that acknowledge the legitimacy of states acting to "encourage the growth and development of intrastate commerce and industry." DaimlerChrysler Pet. at 17 (quoting *Boston Stock Exchange*, 429 U.S. at 336-37). But these dicta offer nothing to support tax provisions that single out in-state economic activity for preferential treatment. On the contrary, they have consistently been careful to distinguish the legitimacy of the state's purposes from the acceptability of the means selected to further them, *see, e.g.*, *Bacchus Imports*, 468 U.S. at 271, and to clarify that the permissible means do not include measures that discriminate in their treatment of in-state and out-of-state activity, *see, e.g.*, *Boston Stock Exchange*, 429 U.S. at 329. The specific sorts of state competition for industry that the Court's dicta have countenanced, such as uniformly

applicable reductions of state taxes and government support for services needed by business, *see, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994), include only provisions that do not differentiate benefits or burdens based on a business's location.[3]

Finally, unable to find any support in the decisions of this Court, Petitioners contend that the Sixth Circuit's decision is in conflict with the ruling of the Michigan state courts in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992). *See* State Pet. at 14-15; DaimlerChrysler Pet. at 11-12. But, as State Petitioners acknowledge, at 15, that case concerned a tax regime, and a tax benefit, dramatically different from those in the present case.

The tax involved in *Caterpillar* was Michigan's unique Single Business Tax, a form of value-added tax under which a business's tax liability is measured, not by its net income, but by its total business activity, including, *inter alia*, its costs for payroll and for acquisition of capital equipment, apportioned to reflect the portions of that activity attributable to Michigan. *See generally Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358 (1991)

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[3] The State Petitioners go so far as to suggest that the *Westinghouse* Court specifically endorsed the use of tax incentives, including investment tax credits. *See* State Pet. at 16. But a full reading of the relevant passage, *Westinghouse*, 466 U.S. at 407 n.12, reveals that the Court was taking no position on this question, but was merely describing the position articulated by New York: "The Tax Commission seeks to classify the tax credit at issue here as an indirect subsidy to export commerce, similar to provision and maintenance of ports, airports, waterways, and highways; to provision of police and fire protection; and to enactment of job-incentive credits and investment-tax credits." The Court offers no opinion on which, if any, of such measures would pass constitutional muster.

(discussing Michigan's Single Business Tax). The challenged provision in *Caterpillar* was a "capital acquisition deduction" ("CAD") which adjusted the tax base to exclude the costs for capital acquisitions tied to Michigan business activity. Since the single business tax base was designed to include only the share of capital acquisitions attributable to its in-state activity, the Michigan court concluded that a deduction designed to be similarly restricted to capital acquisitions attributable to Michigan does not discriminate. "Since the tax base after apportionment represents only Michigan business activity, only capital acquisitions related to Michigan business activity should qualify for treatment pursuant to the CAD. The CAD . . . is designed to accomplish this result." *Caterpillar*, 488 N.W.2d at 186. In short, in the Michigan court's view, the CAD did not discriminate because both the tax base and the deduction were designed to include only those capital acquisitions attributable to Michigan, so that the CAD did not confer any competitive advantage on in-state capital investment. *See id.* at 192. Thus, in upholding the CAD, the Michigan court characterized both its purpose and its effects in ways entirely inapplicable to Ohio's ITC.

In sum, the Sixth Circuit's decision invalidating Ohio's ITC represents a straightforward application of a well established and central element of this Court's Commerce Clause jurisprudence. Despite Petitioners' claims, it raises no conflicts with the prior decisions of this Court, or of the lower courts, and, in fact, any contrary ruling would have required heroic efforts to distinguish and avoid this Court's numerous anti-discrimination precedents. Petitioners seek to cloud this fact by emphasizing the Court's observation in *Westinghouse* that its Commerce Clause analysis "has left much room for controversy and confusion

and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." DaimlerChrysler Pet. at 13; State Pet. at 14 (quoting *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984)). But, for the reasons explicated by the Sixth Circuit and in this Memorandum, just as the Court went on to observe in *Westinghouse*, "there is little room for such 'controversy and confusion' in the present litigation." *Id.*

## CONCLUSION

This case presents issues of great practical importance which would benefit from the Court's review. On the merits, the portion of the Sixth Circuit's decision invalidating Ohio's ITC follows straightforwardly from this Court's well-established Commerce Clause jurisprudence and should be affirmed.

Respectfully submitted,

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(3)

No. 04-1704

# In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

*Petitioner,*

v.

CHARLOTTE CUNO, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITIONER'S REPLY BRIEF

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### *1. The Nationwide Importance Of This Case Warrants Review*

The parties are in agreement on the central issue now before the Court in this case: all of them urge the Court to grant the petition for certiorari. Respondents acknowledge that "the issues raised by this case are of broad national importance, because they will apply to a range of comparable business tax incentives offered by many states." Resp. Br. 5. As we showed in the petition (and as respondents also recognize (see *id.* at 7-8)), the Sixth Circuit's decision is greatly impeding the use of business development incentives in all of those states. By doing so, the holding below *already* is affecting job-creation efforts in innumerable jurisdictions, interfering with the investment decisions of businesses and the financial plans of taxing officials across the Nation, and disturbing the long-settled expectations of taxpayers.[1] These unfortunate effects are highlighted by the extraordinary outpouring of *amicus* support for DaimlerChrysler's petition and the companion petition filed by the State of Ohio in *Wilkins* v. *Cuno*, No. 04-1724: *amici* urging the grant of certiorari include 27 states and the District of Columbia, the Nation's leading organizations of state and local officials, the broadest range of business interests, and organized labor.

Respondents are incorrect, moreover, when they seek to downplay the impact that tax incentives actually have on in-

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[1] As noted by *amici* States of Florida, *et al.*, the uncertainty created by the decision below as to the constitutionality of tax incentives even outside the Sixth Circuit means that corporations nationwide are "disinclined to rely on the incentives currently offered by the States." Br. of Florida, *et al.*, at 4. See also 151 Cong. Rec. S5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("States and businesses have been reluctant to go forward with new projects that depend on the availability of tax incentives out of concern that the *Cuno* decision may be used to invalidate those incentives.").

vestment decisions. See Resp. Br. 7. Respondents' assertion that incentives rarely influence such decisions is belied by the real-world actions of businesses and government officials: it is difficult to believe that state and local governments would forgo very substantial tax revenues (see *id.* at 6) unless they were getting something for the money. In fact, an assertion like the one advanced by respondents "seems odd. We typically think of competition as an effective mechanism for allocating scarce social resources to the party that values them most highly, and there initially seems little reason to believe that governmental bids vary from this principle." Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 448 (1997). The point is confirmed by the experience of *amici* like Nissan North America, Inc., Ford Motor Company, and General Motors Corporation, which represent that tax incentives have a significant impact on investment decisions – and that such incentives are especially important in giving state and local governments the wherewithal to compete with foreign nations for capital investment. See Br. of Nissan North America, Inc., at 8-12; Br. of Ford Motor Co. and General Motors Corporation at 5.[2]

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[2] See also Br. of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, at 3-5 (noting that tax incentives are essential for certain states and regions to compete for investment); 51 Cong. Rec. S5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("As a former Governor who had to compete against Japan, Canada, China and Europe for new business projects, I know just how important a role tax incentives can play in attracting new businesses. I can assure you that our competitors are certainly not going to stop using tax incentives.").

### 2. *There Is Great Uncertainty About The Application Of Commerce Clause Principles To State Tax Incentives*

The great practical importance of this case in itself makes review imperative. But it also is appropriate to note that respondents are wrong in contending that there is nothing "novel[]" in the Sixth Circuit's decision and that the holding below "follows straightforwardly from a long line of this Court's decisions." Resp. Br. 2. As we observed in the petition, commentators – including those whose views are endorsed by respondents (see *id.* at 3) – have described the "palpable tension in the Supreme Court's decisions" in this area (Hellerstein & Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 791 (1996)) and have noted that "the Court has not had occasion to address a challenge grounded in the claim that a state tax provision's primary purpose or effect is to attract business to locate or expand in the state." Enrich, *Saving the States From Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 381 (1996). Before the Sixth Circuit, respondents themselves candidly recognized that their claim rests on a "novel legal theory." No. 01-3960, *Cuno* v. *DaimlerChrysler Corp.* (6th Cir.), Pl. Br. viii.

Indeed, the uncertainty in this area of the law is manifest on the face of the Sixth Circuit's decision. The court of appeals acknowledged that "[t]he United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes." Pet. App. 5a. In nevertheless striking down Ohio's ITC, the Sixth Circuit refused to draw a distinction "between laws that benefit in-state activity and laws that burden out-of-state activity" because, "economically speaking, the effect of a tax benefit or burden is the same." *Id.* at 9a, 10a. Yet in the very next paragraph of its

opinion, the court *did* draw just such a distinction between "the investment tax credit [and] a direct subsidy," even though a subsidy (which plainly would be constitutional) "would no doubt have the same economic effect" as the tax credit. *Id.* at 10a. This inconsistency in the Sixth Circuit's approach – sometimes attaching dispositive significance to "formal distinctions that lack economic substance" (*Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 405 (1984)) and other times ignoring them – encapsulates the existing confusion in the law of the Commerce Clause as it relates to economic development efforts.

### *3. The Sixth Circuit's Decision Conflicts With The Michigan Supreme Court's Holding In Caterpillar*

That confusion also is apparent in the significant tension between the Sixth Circuit's holding and the decision of the Michigan Supreme Court in *Caterpillar, Inc.* v. *Department of Treasury*, 488 N.W.2d 182 (Mich. 1992). As we showed in the petition (at 11-12), the Michigan court upheld that State's capital acquisition deduction (the "CAD") for the cost of acquiring real property located in Michigan, although no deduction was available for real property acquired in other states. Respondents attempt to distinguish *Caterpillar* from this case on the ground that *Caterpillar* involved a value-added tax that was based on the taxpayer's total Michigan business activity, rather than a corporate income tax. Because the tax base for Michigan's levy "was designed to include only the share of capital acquisitions attributable to in-state activity," respondents assert "that a deduction designed to be similarly restricted to capital acquisitions attributable to Michigan does not discriminate." Resp. Br. 17. But this is a distinction without much of a difference. State taxes based on corporate income, like the Ohio franchise tax at issue in this case, *also* are designed to capture only income that is properly attributable to activities in the taxing state; that is why states apply apportionment formulas to determine what

percentage of taxpayer income is subject to local tax. See, *e.g.*, *Amerada Hess Corp.* v. *Director, Division of Taxation*, 490 U.S. 66, 73-75 (1989). Michigan used just such a formula in calculating its value-added tax. See *Caterpillar*, 488 N.W.2d at 185-186.

In fact, Michigan did allow deductions from its tax for some expenses incurred outside the state, so long as those expenses were "related to Michigan business activity." *Caterpillar*, 488 N.W.2d at 186. Respondents therefore are wrong if they mean to suggest that the theory of the value-added tax permitted deductions only for expenses physically incurred in Michigan; Michigan's CAD actually offered an apportioned deduction measured by the value of tangible *personal* property acquired by the taxpayer out-of-state. See Pet. 11-12 n.7. Yet, to encourage in-state investment in *real* property, the CAD provided a deduction for the cost of acquiring such property only if it were located in Michigan. See Pet. 11. In doing so, Michigan offered a tax benefit for in-state business investment, while denying an equivalent benefit for equivalent investment made out-of-state – just as Ohio does here. The analysis used by the Michigan Supreme Court in upholding this regime cannot be reconciled with the Sixth Circuit's rationale for invalidating Ohio's similar tax incentive.

#### *4. The Holding Below Departs From Commerce Clause Principles*

Although detailed discussion of the merits of the case is premature at this point, it should be noted that respondents' defense of the Sixth Circuit's analysis is premised on a misunderstanding of the arguments presented in the petition. We do not contend, as respondents would have it, that the Commerce Clause invalidates only state laws that fall within particular narrow pigeonholes. See Resp. Br. 10-12. To the contrary, our disagreement with the Sixth Circuit stems from that court's use of a wooden, formulaic approach that is di-

vorced from the Commerce Clause's underlying concern with state protectionism and economic Balkanization. Had the court of appeals engaged in the "sensitive, case-by-case analysis of [the tax's] purposes and effects" that is mandated by this Court's decisions (*West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994)), it would have seen that something has gone badly awry when *in-state* taxpayers successfully invoke the Commerce Clause to prevent tax cuts for *out-of-state* businesses that are seeking to expand their *interstate* operations. It is respondents' avowed goal, after all, to "save the states from themselves" by allowing domestic taxpayers to use the Commerce Clause against their own states when state officials offer tax incentives to lure business across state lines. Protecting state residents from their own state legislatures in this way may or may not advance a sensible policy goal – but it surely constitutes a radical departure from the principles that underlie the Commerce Clause.

In this regard, it is revealing that respondents nowhere address the "practical or economic effect" (*Goldberg* v. *Sweet*, 488 U.S. 252, 262 (1989)) of Ohio's ITC. As we showed in the petition (at 24-26), Ohio's incentive program offers a one-time benefit to taxpayers as a reward for engaging in specified economic activity; the ITC plainly was not intended to (and does not in fact) offer a systematic advantage to domestic businesses over out-of-state competitors. This sort of provision – designed "to invite, even entice, the outsiders in" (Enrich, *supra*, 110 HARV. L. REV. at 412) – is identical in its economic effect to a one-time subsidy, a type of business incentive that unquestionably is constitutional. See Pet. 25. Yet respondents do not offer any Commerce Clause policy that is advanced by invalidating such a provision, whether it is cast in formal terms as a subsidy or as a tax incentive.

We agree with respondents that no decision of this Court has upheld a provision just like Ohio's ITC. But as we showed in the petition (at 19-26), it is equally true that the

Court also has never invalidated such a provision.[3] Because a substantial majority of the states offer tax incentives that do not differ from the ITC in any material respect – and because the Sixth Circuit's decision has destroyed the certainty that is necessary for such incentives to operate – this Court's guidance is urgently needed.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari in this case and in *Wilkins* v. *Cuno*, No. 04-1724.

Respectfully submitted.

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[3] Respondents suggest that *Westinghouse Elec. Corp.* is such a case. Resp. Br. 13. As we explained in the petition (at 20-21), however, that case was decisively different from this one because the New York provision there at issue not only rewarded in-state business operations, but also affirmatively penalized any increase in out-of-state activity. Respondents agreed with us on this point before the district court, acknowledging that "the presence of such penalties distinguishes the credit involved in *Westinghouse Electric* from the credit challenged here." R. 55, Pl. Commerce Clause DC Mem. 22-23, CA App. 372-373.

(14) (8)

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WILLIAM W. WILKINS, *et. al.*,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICAIN SUPPORT OF PETITIONERS

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of the Council On State Taxation, the National Association of Manufacturers, and the Chamber of Commerce of the United States of America as *amici curiae* in support of petitioner.

## INTEREST OF *AMICI CURIAE*

The three *amici curiae* who have joined to file this brief are trade associations that represent the largest investors in our nation's state and local economies. Between the three organizations, every major business interest is represented.[1]

The Council On State Taxation ("COST"), is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. Many of the 45 states that impose a form of corporate income tax also incorporate some form of investment tax credit—the concept at issue in this case—or similar incentive, and most COST members have utilized investment tax credits. Thus, COST members have a financial interest in whether the investment tax credits are valid.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The members of NAM thus also have a financial interest in whether the investment tax credits are valid.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties have been obtained and filed with the Clerk of the Court.

federation. With a substantial presence in all fifty states and the District of Columbia, the U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American business, the U.S. Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

Each of the *amici* serve business memberships that are directly impacted by the reasoning and the result reached in this case; the legal, political and economic ramifications of the Court of Appeals' decision are already reverberating for both governmental and commercial entities through the Sixth Circuit and nationwide. Hence, each of the *amici* have a vital interest in the proper disposition of this case.

The *amici* and their respective members constitute a broad swath of companies that are in a position to dramatically impact our subnational economy through new and continued investment that is designed to enhance economic development. These companies have physical presence in Ohio, each of the other Sixth Circuit states, and nationwide. This presence is associated with activities that enhance our Gross Domestic Product; generate taxable receipts and net income subject to all levels of governmental tax jurisdiction; create and improve the economic prospects for individual Americans; and promote the vitality of American communities. This presence is created through substantial capital investment by such companies, and it is sustained through continuing investment by the same companies.

## SUMMARY OF ARGUMENT

Tax incentives, similar to the Ohio investment tax credit struck down by the Sixth Circuit Court of Appeals, are an important feature of state taxation. Specifically, they operate as part of an overall tax structure to mitigate tax increases that often result from increased in-state activity. Further, tax-

payers and tax jurisdictions significantly rely on the continued availability of state tax incentives; the Sixth Circuit's decision has sent taxpayers and taxing jurisdictions down a path of confusion and only this Court can restore the stability and certainty that is desperately needed.

The constitutional analysis adopted by the Sixth Circuit is flawed. "Tax-neutral decision making," as applied by the court of appeals, is an unworkable standard. Nearly every business decision is premised on tax considerations and it would be irresponsible for taxpayers to ignore tax provisions in evaluating alternatives. Further, the court's application of "tax-neutral decision making" unjustifiably leads to different results. For instance, a taxpayer with a preexisting Ohio tax liability is, under the court's theory, "coerced" by the investment tax credit into expanding in Ohio, while another taxpayer without a preexisting Ohio tax liability is not. Meanwhile, both taxpayers would be seeking the same tax benefit—an Ohio franchise tax credit available to offset *future* Ohio tax. This differing result proves that the court's utilization of the "tax-neutral decision making" standard is unworkable. This Court should grant the petition for writ of *certiorari* and overturn the Sixth Circuit's application of the "tax-neutral decision making" standard.

## ARGUMENT

The question presented in this appeal is whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3. However, the ramifications of this appeal are not limited to tax type, tax jurisdiction, or taxpayer.

The *amici* are uniquely positioned to know and assess the prevalence and potential economic value of incentives such as those offered by the State of Ohio (an investment tax credit against Ohio's corporate franchise tax). The companies that

make such capital investments are offered a vast array of tax and non-tax credits and incentives.[2] Some of these require affirmative action by the taxpayer (*e.g.*, application or submission of an investment plan) in order to qualify for such incentive; some are automatically available by operation of statute if the taxpayer meets certain enumerated criteria. Regardless of the administrative features of a tax incentive, many corporate taxpayers that qualify for incentives score their value highly and are required to accurately reflect their value in financial statements, estimations of effective tax rates, and assessments of return on investment.

The rationale for tax incentives is no mystery to any beneficiary of economic development initiatives. The direct beneficiaries of incentives include the corporate recipients of tax incentives; the employees and commercial partners of such corporations; the families of such employees; and the communities that accrue infrastructural benefits of "run-off" investments and commercial development (*e.g.*, retail, dining, entertainment and personal services establishments, all of which entail additional employment and payment of taxes). States and localities substantiate the use of tax incentives on a variety of grounds: to attract and to reward new investment, as well as continued investment in pre-existing plants, facilities and equipment; to replace other manufacturing and commercial enterprises that no longer provide an equivalent economic base; to compete with other localities that wish to entice economic investment within their borders; and to compete on an international playing field for these same capital expenditures.

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[2] "All states offer some form of incentives. In addition, most local governments offer incentives. These incentives may come in the form of tax reductions or abatements, financial assistance, or infrastructure grants or refunds." *Business Incentives Guide* (CCH) ¶ 105 (2005).

The memberships of *amici* can attest to the fact that the enactment of incentives also finds its justification in the mutually beneficial experience of both governmental authorities and corporate enterprises. Qualification for the typical tax incentive is premised upon the applicant meeting certain threshold levels of investment, and incentives are often explicitly premised upon the applicant maintaining a fixed level of employment, capital investment, or other economic indicia of significance to the jurisdiction that offers the incentive. Thus, while the jurisdictions that offer incentives have provided an economic benefit to the recipients of same, they also ensure that the benefits equation will balance over time. In this regard, many state and local tax incentives are drafted so as to "claw back" the incentive (*i.e.*, reverse the tax effect of an incentive that was previously taken by a corporate taxpayer), if the corporate taxpayer is determined on a retroactive basis not to have met its statutory or regulatory commitments during the period to which an incentive pertained.

The potential loss of state and local jurisdictions' ability to provide incentives, and of taxpayers' ability to utilize incentives, would have dire ramifications. First, there would be a loss of economic investment and activity to various foreign countries; and the investment made by foreign manufacturers in the United States would likely also dissipate. Second, the court of appeals' decision would undermine the United States' federal tax policy of providing incentives.[3] Third, there would be significant financial statement impacts on those companies that had been reflecting their entitlement to incentives in their calculations of profitability; the corre-

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[3] *Cf.* 26 U.S.C. (Internal Revenue Code) § 199, "Income attributable to domestic production activities" (this provision allows an income tax deduction associated with certain U.S.-based production activities), and § 965, "Temporary dividends received deduction" (this provision allows an income tax deduction for repatriating certain foreign dividends that will be invested within the U.S.).

sponding creation of confusion in the financial markets should not be underestimated.

In the current uncertain environment created by the decision of the court of appeals, the involvement of this Court is needed to re-stabilize the environment and reduce litigation costs. The court of appeals' decision has sent taxpayers and state and local government down a path from which there is no turning back. Unless this Court grants review, there will be unavoidable confusion, uncertainty and rampant litigation regarding the availability of state tax incentives. Further, the uncertainty created by the breadth of the Sixth Circuit's decision has already begun to impact the ability of those states to compete for investment and expansion of business. Without review of the issue by this Court, the Sixth Circuit states will continue to suffer this disadvantage while the issue festers through years of litigation in other states.

### A. The Court of Appeals' Decision Upsets Settled Expectations and the Reasonable Reliance Interests of Taxpayers, Jurisdictions that Offer Incentives, and Others.

All parties to this benefits equation have long-settled expectations that their mutual commitments would be respected and upheld. Most large companies have reasonably relied on the plethora of tax incentives that are today available in all 50 states and many localities. The indicia of such reliance are undeniable. They include, but are certainly not limited to, negotiations/contracts with state economic development agencies and revenue agencies; the design and implementation of capital investments that will qualify for particular state and local tax incentives; the reflection of such expenditures on tax returns (e.g., positions and disclosures), the maintenance of work force in place, and investment in employee training. Based as well on the actions of their counterparts, companies may reasonably rely on these incen-

tives; state legislatures, state executive branches, state revenue departments and local governmental entities have designed, implemented, and administered the incentives in concert, over the course of many years.

Likewise, state and local governments have reasonably relied on the availability of a variety of tax incentives to attract and retain businesses, especially in economically disadvantaged areas. State and local governments must develop and enact budgets annually. These budgets often are dependent upon estimates of tax revenues and expenditures. A critical component for many state and local jurisdictions in developing reliable budget estimates is reasonable reliance on commitments derived from tax incentive arrangements. Striking down common tax incentives, like the Ohio investment tax credit, undoubtedly will upset the stability of budgets in a substantial number of jurisdictions.

Investors have also come to expect that this kind of common investment incentive is, and has long been, constitutional. While the Court has consistently struck down discriminatory tax provisions,[4] the investment tax credit that was struck down in *Cuno* is different and does not unconstitutionally discriminate. First, a nondomiciliary taxpayer

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[4] *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) (overturned New York transfer tax imposed at higher rates on sales of stock occurring on non-New York exchanges); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (overturned Louisiana first-use tax on natural gas that applied to all purchases except those by Louisiana consumers, due to exemption/credit scheme); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (overturned Hawaii wholesale excise tax on liquor that exempted locally produced pineapple liquor); *Westinghouse Electric v. Tully*, 466 U.S. 388 (1983) (overturned New York franchise tax credit for DISCs that was subject to reduction to the extent that DISC makes export sales from non-New York locations); *Associated Ind. of Missouri v. Lohman*, 511 U.S. 641 (1994) (overturned Missouri use tax on interstate sales that was imposed at occasionally higher rates than sales tax on intrastate sales).

and state/local government representatives are seeking *jointly* to overturn the decision. This case is unlike any other case where this Court has considered whether a state tax provision violates the Commerce Clause. This unusual alignment of interests evidences the commonly held view that the Ohio investment tax credit, and others like it, are valid.

Second, tax incentives encourage economic growth; they do not discriminatorily limit growth. In this regard, the Ohio investment tax credit and analogous incentives are consistent with the fundamental purpose of the Commerce Clause and this Court's decisions: to ensure the free flow of goods among states and to ensure that states do not engage in economic protectionism.[5] Further, they are not intended to, and do not in fact, erect economic barriers between the states for the reasons set forth below.

Nearly every state provides some form of investment tax credit, which is tailored to the individual state's needs and economic priorities. The Ohio investment tax credit, like many other tax incentives, does not contain discriminatory prerequisites to qualification, nor is the credit reduced or eliminated as a result of an increase in out-of-state activity by a recipient of the tax credit or any other person. For instance, the Ohio investment tax credit is not limited to companies incorporated in the state—any company (regardless of state of incorporation or domicile) that chooses to invest in the

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[5] *See, e.g., Associated Ind. of Missouri v. Lohman*, 511 US 641, 647 (1994): "The [Commerce] Clause prohibits economic protectionism--that is, 'regulatory measures designed to benefit in state economic interests by burdening out of state competitors.' *Id.*, at 273-274. Thus, we have characterized the fundamental command of the Clause as being that 'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State,' *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984), and have applied a 'virtually *per se* rule of invalidity' to provisions that patently discriminate against interstate trade. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)."

statutorily prescribed fashion may qualify for the Ohio credit. Other types of state tax provisions complement the adoption of tax incentive measures; for example, the significant adoption by states of single sales factor apportionment formulas[6] is similarly designed to enhance a state's ability to retain and/or attract the location of manufacturing or other corporate facilities in-state. These credits are generally intended to mitigate the tax increases (at least in the short run) that often result from the effect of in-state investment on a taxpayer's apportionment formula by virtue of increased in-state property and payroll. In short, the Ohio income tax incentive is an integral part of state taxation and is consistent with the purpose of the Commerce Clause.

### B. The Court of Appeals' Decision Provides an Unworkable Rule.

The decisional standard that this Court articulated in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, (1977)—namely, that a discriminatory tax incentive "*forecloses tax-neutral decisions*"—was misapplied by the Court of Appeals. While *Boston Stock Exchange* itself was correctly decided, the standard articulated in the decision is ambiguous, and as reflected in the underlying decision, can lead to wildly erroneous results without additional practical guidance on the standard's correct application. Even the Court of Appeals below articulated its unease with this standard; asserting that "[t]he United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes," the Court nevertheless found it possible to conclude that the Ohio investment tax credit has a "coercive" effect on taxpayers (*i.e.*, one that precludes tax-neutral decisions on the part of those taxpayers who might

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[6] *See, e.g.*, New York's recent adoption of single sales factor for income tax apportionment purposes effective 2008. N.Y. Tax Law § 210(3)(a)(10)(A)(iii) (2005).

qualify for the incentive). *Cuno v. DaimlerChrysler*, 386 F.3d 738, 743 (6th Cir. 2005).

Nearly every business decision and investment involves tax consequences that are considered and influence the decision itself. So, for instance, a business decision concerning where to manufacture automobiles would necessarily involve consideration of material costs (including sales taxes, excise taxes and other transaction taxes), labor costs (including employment taxes), and facility costs (including property taxes and depreciation deductions for income tax purposes). No one would suggest that the tax provisions impacting these business decisions (e.g., generally imposed sales taxes, employment taxes and income taxes) are unconstitutional merely because they influence business decisions, and by definition, foreclose "tax-neutral decision making." Similarly, the Ohio tax credit does not unconstitutionally discriminate against interstate commerce.

Further, the "tax-neutral decision making" standard, as applied by the Court of Appeals, suffers from other defects. The Sixth Circuit found the Ohio investment tax credit "discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. Specifically, any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state." *Cuno*, 386 F.3d at 743. Does the court's analysis mean that the investment tax credit would be constitutional, had the taxpayer not already been subject to Ohio franchise tax? It is clear, using the court's rationale, that a company without a preexisting Ohio franchise tax would not be "coerced" into expanding in Ohio as that taxpayer would not have existing Ohio tax liability to reduce. However, a taxpayer without a preexisting Ohio franchise tax liability may find Ohio's tax provision just as

attractive as a taxpayer with a preexisting Ohio tax liability—in both cases, taxpayers would be seeking to avoid a tax associated with new activity—thereby undermining any justification for a different constitutional result.

This Court should ensure that its prior precedent is applied in such a way that permits states to encourage in-state investment provided the benefit is equally available to all and does not lead to tax increases on those that do not elect to participate.

## CONCLUSION

For the reasons stated above, *amici curiae* respectfully request the United States Supreme Court to accept this case for review.

Respectfully submitted,

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No. 04-1704

IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *PETITIONER*

v.

CHARLOTTE CUNO, ET AL., *RESPONDENTS*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art I, § 8, cl.3.

## CORPORATE DISCLOSURE STATEMENT

Ford Motor Company ("Ford") is a publicly-held corporation. Ford has no parent corporation, and there is no publicly-held corporation that owns 10% or more of Ford's stock.

General Motors Corporation ("GM") is a publicly-held corporation. GM has no parent corporation, and there is no publicly-held corporation that owns 10% or more of GM's stock.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

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This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of Ford Motor Company and General Motors Corporation as *amici curiae* in support of petitioner.[1]

## INTEREST OF *AMICI CURIAE*

The *amici curiae* are United States corporations engaged in capital intensive business activities. These activities include, in particular, the manufacture and sale of automobiles and

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[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

trucks in the United States and in worldwide markets. In the course of these commercial activities, the *amici* make significant capital investments within the United States in States such as Michigan and Ohio and also make large investments in foreign locations. In planning these capital investments, the *amici* necessarily consider commercial factors such as the availability of skilled labor and the relative costs of constructing and operating facilities in different locations. The local tax structures and local tax rates that apply to manufacturing operations are among the many significant cost factors that are considered in selecting the location for such facilities.

The *amici* operate manufacturing facilities in several States that possess similar or identical investment tax credit provisions to those addressed in this case. For example, *amicus* Ford Motor Company currently employs more than 14,000 people in the State of Ohio, more than 66,000 people in the State of Michigan, and has made more than $11 billion of capital expenditures in these States over the last five years. In addition, during the last five years, Ford has made over $4 billion of capital expenditures in other States that have similar or identical tax credit provisions.

*Amicus* General Motors Corporation currently employs more than 20,000 people in Ohio, more than 75,000 people in Michigan, and has made over $12 billion of capital expenditures in these States in the last five years. Throughout the remainder of the Nation, in other States that have tax credit provisions similar to those at issue in this case, General Motors has invested more than $3 billion in the construction or expansion of manufacturing facilities within the last five years.

In the current conditions of the world economy, the ability of state and local governments to provide tax credits to

facilitate the location and expansion of manufacturing activity within their borders is a matter of great importance. The availability of such tax credits allows the States to provide a more level playing field for American manufacturers competing in worldwide markets. The availability of these credits also thereby assists employers such as the *amici* in their efforts to provide employment opportunities, and the economic benefits of employment, within those locations.

Because the decision of the court of appeals in this case has obvious broad importance to their business operations, the *amici* submit this brief in support of the petition for a writ of certiorari.

## ARGUMENT

The question here presented has substantial and continuing importance to businesses and to state and local governments. It calls into question the integrity of the tax incentives and economic assumptions that underlie business location decisions within the United States and across our borders as well.

The decision of the court of appeals invalidating Ohio's investment tax credit discounts the purpose for the credit, disregards fundamental principles enunciated by this Court, misapplies the precedents of this Court, and is at odds with a decision of the highest court of a State in the same Circuit. If left undisturbed, the decision below will have far-reaching effects not only in the Sixth Circuit but throughout the entire Nation.

Because of the importance of the question presented and the need for prompt resolution of the conflict created by the decision below, the petition for a writ of certiorari should be granted.

**1. The rationale and need for state and local investment tax credits.**

An investment tax credit is one particular form of tax incentive offered by state and local governments in furtherance of their own tax policies. The credit typically provides a one-time reduction in state income taxes for new investments in manufacturing equipment and machinery. It is generally available for all investments in manufacturing assets located in the tax-credit jurisdiction and is available regardless of the interstate or intrastate character of the taxpayer's business.

In one form or another, an investment tax credit has been enacted by virtually every State. See Pet. 2, 7-9. In Ohio, for the years here at issue, the investment tax credit is generally calculated as 7.5 percent of the amount by which the taxpayer's investment in manufacturing equipment and machinery during the tax year exceeds the amount of such investment over the prior three years. Ohio Rev. Code § 5733.33. The credit could increase to 13.5 percent and also be subject to a $1 million cap under certain circumstances

The investment tax credit serves several important economic functions. Viewed from the perspective of the State, the primary goal of the tax credit is, of course, to enhance the overall economic infrastructure of the State by providing an incentive for business investments that will lead to new employment opportunities and, as a result, new sources of income for citizens. The investment tax credit also leads to expanded tax revenues for the State itself, both (i) from the increased taxes on the new income earned by individuals from the new employment opportunities created by the new investment and also (ii) through increased sales, payroll, property and income taxes on the additional business activities generated through the new investment.

The investment tax credit also plays an important role for businesses. In planning and implementing rational business investments in what have become worldwide markets, companies such as the *amici* necessarily consider all relevant cost factors, including local tax structures and rates. The availability of a tax credit in a particular State or from a particular local government can be of substantial importance in determining the best economic environment in which to conduct business. The availability of these tax credits allows the States to create a more level playing field for domestic manufacturing activity competing in worldwide markets, and thereby assists the efforts of businesses to utilize the available domestic pools of skilled labor in world commerce.

### 2. The decision of the court of appeals disregards fundamental principles enunciated by this Court.

In *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977), this Court set forth certain fundamental principles that establish the framework within which a State may shape its policy toward business taxation.

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. at 336-337. In other words, a State is free to use its tax system to encourage the growth of local business as well

as to compete for a share of interstate business, provided that in doing so, it does not impose an inappropriate tax burden on out-of-state business activity. The imposition of such a burden may cause the State's taxing scheme to run afoul of the Commerce Clause.

Consistent with the framework established in *Boston Stock Exchange*, it is clear that a State may utilize low tax rates to attract new business investment. *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 199 n.15 (1994) ("In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes."). A tax credit or exemption of the type here involved is merely a subset of an across-the-board low-tax regime. It is one of the classic tax incentives that a State may offer to attract new business investment. The credit provides a one-time reduction in the effective tax rate for those who qualify for its benefit. And it does so without imposing any tax burden whatsoever on those who choose not to qualify.

The court of appeals initially recognized the fundamental principles set forth in *Boston Stock Exchange*. Pet. App. 4a-5a. It also acknowledged that the Ohio investment tax credit was "equally available to in-state and out-of-state businesses." Pet. App. 6a. It then proceeded to hold the tax credit unconstitutional.

The court of appeals was apparently influenced by respondents' contention that the credit somehow discriminated by "coercing" in-state taxpayers to make investments in machinery and equipment in Ohio at the expense of development in other States (Pet. App. 6a), and that the result was to "hinder free trade among the states." *Id.* at 9a. In addition, the court of appeals apparently believed that, because the Ohio tax incentive provides a benefit to

those who make the requisite investment in order to take advantage of the credit, it must somehow impose a corresponding burden on those who choose not to take advantage of it. *Id.* at 9a-10a.

The court's "benefit-burden" dichotomy was based on this Court's statement in *Bacchus Imports* v. *Dias*, 468 U.S. 263, 273 (1984), to the effect that "[v]irtually every discriminatory statute allocates benefits and burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relevant sense." The threshold question presented in this case, however, is whether the Ohio tax credit provision *is* a "discriminatory statute" in the first instance.

What the court below apparently considered to be a legally impermissible tax burden is in fact nothing more than an "opportunity cost" that would inevitably be incurred by any taxpayer who chooses to forego Ohio's tax credit by investing elsewhere. An opportunity cost is something incurred as a matter of business judgment. It is not the equivalent of a tax cost or "detriment" imposed by a state statute. No case decided by this Court has held that a tax incentive of the type here involved violates the Commerce Clause simply because the taxpayers who choose not to take advantage of it will incur an opportunity cost as a result.

Ohio's investment tax credit is designed in the precise manner contemplated by this Court in *Boston Stock Exchange*. Its purpose is to encourage the growth of intrastate business and to compete for a share of interstate and worldwide business. The credit is constitutionally permissible because it performs its function without imposing a tax burden of any kind on "products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 337.

### 3. The decision of the court of appeals misapplies the precedents of this Court.

The Ohio investment tax credit does not distinguish in its application between in-state and out-of-state business, between in-state and out-of-state products, or between interstate and intrastate commerce. It is available as an inducement for any additional business activity involving machinery and equipment, and it is available on precisely equal terms to intrastate and interstate commercial activities. It therefore does not violate the Commerce Clause restrictions on state taxation that are established in the decisions of this Court.

Stated another way, credits and exemptions of the type here involved do not impose the type of burden on interstate commerce that this Court has found offensive. By contrast, in all of the cases on which the court of appeals focused, the local taxing scheme imposed a direct tax burden on taxpayers who chose to engage in particular business activity partly within and partly without the taxing State, rather than carry on all such activity locally.

Thus, in *Boston Stock Exchange*, persons selling stock that would be transferred through a New York transfer agent paid a lower transfer tax if they sold their shares on a New York exchange than if the sale took place on an out-of-state exchange. The higher tax imposed by New York on out-of-state sales constituted "both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." 429 U.S. at 331.

In *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984), exporters shipping products out of New York received a tax credit for their shipments that was not commensurate with their New York exports, but instead

varied in amount based on the proportion of New York exports to total exports. The fact that the credit offered by New York was reduced when out-of-state exports were proportionately greater than in-state exports resulted in impermissible discrimination against interstate commerce.

Finally, in *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), Louisiana imposed a first-use tax on natural gas imported from the Outer Continental Shelf. The tax was imposed on the first local use but was borne by the ultimate consumer. As a result of numerous exemptions and credits offered for particular local uses, the tax was actually borne only by out-of-state consumers. The Louisiana scheme was struck down as constituting impermissible discrimination against interstate commerce.[2]

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[2] The Louisiana scheme also allowed a credit against the local severance tax for any first-use tax paid. This Court stated that the "obvious economic effect" of the credit was to encourage offshore gas producers to invest in further production in Louisiana rather than offshore or in other States. 451 U.S. at 757. The court of appeals highlighted this aspect of the case in its decision below. See Pet. App. 8a.

Because this Court considered the validity of the first-use tax scheme as a whole and did not address the validity of the severance tax credit in a vacuum, *Maryland* v. *Louisiana* cannot be read as addressing the constitutionality of a tax incentive of the type here involved. In fact, the discussion of the severance tax credit was in no way central to this Court's holding, which emphasized the discrimination with respect to ultimate users of the natural gas produced. Moreover, in isolation, this Court's comments regarding the severance tax credit seem questionable. While the credit encouraged offshore producers to invest in Louisiana, it also, by definition, encouraged local Louisiana producers to invest offshore. Only producers engaged in production in both locations could obtain the benefit of the credit. As a result, the credit did not

All three of the foregoing cases involved, in one form or another, what the court below referred to as "location incentives." Pet. App. 10a. In each case, the State's taxing scheme benefited particular business activity conducted locally and imposed a direct tax burden on taxpayers who chose to engage in a portion of such activity out-of-state. In all three instances, this Court found the taxing scheme to be unconstitutionally discriminatory.

Under Ohio's tax incentive regime, a taxpayer, whether in-state or out-of-state, either takes advantage of the investment tax credit or it does not. While the credit is designed to encourage local investment in machinery and equipment, no adverse tax consequences are imposed by Ohio if the taxpayer foregoes the opportunity and invests in another State. In other words, in contrast to the taxing schemes that governed the out-of-state stock sales in *Boston Stock Exchange*, the out-of-state exports in *Westinghouse*, and the out-of-state sales of natural gas in *Maryland* v. *Louisiana*, the Ohio taxing scheme does not impose a direct tax burden on taxpayers who choose to disregard Ohio's location incentive and make their investments elsewhere.

In purporting to address the "economic effect" of the Ohio tax incentive (Pet. App. 10a), the court below incorrectly isolated its analysis solely on the tax credit itself and erroneously failed to consider the overall effect of Ohio's taxing scheme. In particular, the court took no account of the fact that a new investment in machinery and equipment in Ohio would definitely increase both the numerator and the denominator of the property factor in Ohio's three-factor apportionment formula and would also quite likely increase

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discriminate against interstate commerce in favor of local interests, as this Court appears to have implied.

the sales and payroll factors as well, thereby increasing the overall apportionment of income to Ohio. Depending on circumstances, a taxpayer taking advantage of the investment tax credit thus could end up paying *more* tax to Ohio than if it had made its new investment elsewhere.

This Court has never held a state tax incentive to be unconstitutionally discriminatory where, as here, the incentive actually has the potential for increasing state taxes and the only adverse consequence of not taking advantage of it is the opportunity cost that would be incurred. Yet, that is precisely the holding of the court of appeals in the instant case.

**4. The reasoning of the court of appeals is at odds with the reasoning and decision of the highest court of a State in the same federal circuit.**

The reasoning applied by the court of appeals in this case is also at odds with the reasoning and decision of the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), and the Michigan Court of Appeals in *Jefferson Smurfit Corp. v. Department of Treasury*, 639 N.W.2d 269 (2001). (Michigan is, of course, a Sixth Circuit State.)

In the *Caterpillar* case, the Michigan Supreme Court upheld the "capital acquisition deduction" that the State provided for the cost of new capital assets placed in service during the year in calculating the State's value-added tax. That deduction – like the Ohio tax credit provision involved in this case – was available only for new investments in "assets [that] are physically located in" the taxing State. 488 N.W.2d at 187. And, the Michigan deduction – like the Ohio credit – "is available for any taxpayer, whether a multistate company or a company whose business activity is * * * entirely" in the taxing State. *Ibid.*; *see* 488 N.W.2d at 186.

The Michigan Supreme Court held in the *Caterpillar* case that such tax incentive provisions do not discriminate on their face, for they are "available for any taxpayer" and apply equally to interstate and intrastate commercial activities. 488 N.W. 2d at 192. The court further noted that there was no evidence of a "discriminatory purpose" in such tax incentives, for it is well recognized that it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state." *Ibid.* (quoting *Boston Stock Exchange*, 429 U.S. at 336-337). (In *Jefferson Smurfit*, the Michigan Court of Appeals relied heavily on the reasoning of the Michigan Supreme Court in *Caterpillar*.)

The Michigan Supreme Court decision in the *Caterpillar* case is notable for the careful and detailed consideration that the court gave to the constitutional precedents from this Court. By contrast, the decision of the Sixth Circuit in this case provides only a cursory analysis of a selected few of this Court's decisions.[3]

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[3] Respondents Cuno et al. have filed a separate petition for a writ of certiorari in this case (No. 04-1407) that challenges the portion of the decision below (Pet. App. 11a-14a) that held that the Ohio property tax exemption for certain types of qualified new investments does *not* violate the Commerce Clause. DaimlerChrysler, the petitioner in this case (No. 04-1704), filed a brief in opposition to the Cuno petition (No. 04-1407), arguing that the decision of the court of appeals upholding the property tax exemption is both correct and uncontroversial because it simply permits an exemption from state and local property taxes that would not in any event be paid if the property were *not* located within the State. Since the Ohio property tax exemption treats all property – wherever located and whether employed in interstate or intrastate commerce – exactly the same, the suggestion that the exemption somehow discriminates against interstate commerce seems quite insubstantial and therefore does not warrant review by

**5. Prompt resolution of this conflict is a matter of high importance.**

Because the decision below significantly departs from this Court's decisions and threatens to invalidate tax laws in essentially every State, this case plainly presents a matter of substantial recurring importance that warrants review by this Court. In light of the clear importance of the decision below, respondents have expressly acquiesced in the grant of this petition for a writ of certiorari.

It nonetheless remains appropriate to emphasize that the mere existence of the decision below creates enormous planning uncertainties for business investment throughout the United States. The uncertainties created by the decision below have obstructed the ability of taxpayers to proceed with ordinary commercial investment and development decisions. Until these uncertainties are resolved by this Court's review of the decision below, taxpayers cannot logically determine the extent to which state taxes will apply to their business operations and therefore cannot logically determine where or, indeed, whether new investments should be located in any State within the United States.

The world market in which our economy operates will not sit patiently by, awaiting further developments in this Nation's constitutional jurisprudence. The decision below has created uncertainties that seriously impede investment

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this Court. In particular, the few cases on which Cuno et al. seek to rely in support of their petition were all correctly explained and correctly distinguished in the decision of the court of appeals (Pet. App. 11a-14a) and also in the brief in opposition filed by DaimlerChrysler (Br. in Opp. No. 04-1407, at 8-9). For these reasons, the *amici* join in recommending that the Cuno et al. petition be denied.

decisions to locate new business operations within the various States, and the resulting delay and confusion is unavoidably harmful to the growth and development of our Nation's commerce as a whole. For all of these reasons, review by this Court of the decision below is warranted.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 04-1704

IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
*Petitioner,*

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AS *AMICUS CURIAE*, IN SUPPORT OF DAIMLERCHRYSLER CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

No. 04-1704

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This brief *amicus curiae* is filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (UAW), an international labor union, headquartered in Detroit, Michigan, consisting of nearly 1,000 local unions representing approximately 1.3 million active and retired members and their families. The parties to the case have consented to the filing of this brief *amicus curiae*.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

The UAW represents members employed both within and outside of the automotive industry. Those members are employed in states throughout the nation that utilize tax incentives like the one at issue in this case, including Ohio. In fact, the plant at the center of this controversy, DaimlerChrysler's Jeep Assembly Plant in Toledo, Ohio employs 3,628 active UAW members.

## SUMMARY OF ARGUMENT

In the decision at issue in this case, the Sixth Circuit Court of Appeals found that Ohio's investment tax credit, which is utilized to attract business and jobs to the state, violates the Commerce Clause of the United States Constitution by discriminating against interstate commerce. By prohibiting Ohio's use of its investment tax credit, the Court of Appeals apparently intended to level the playing field amongst states competing for new businesses and jobs by making sure that a state does not employ incentives that discriminate against interstate commerce. We submit that the Court of Appeals' decision does not achieve this goal and may indeed work directly against it. As a result, we would also submit that the Court of Appeals' decision warrants review.

## ARGUMENT

It is the plain reality of today's economy that states routinely compete with each other to entice corporations to invest in their states. In fact, states have no choice but to offer such incentives because "every other serious contender state and community will give them, and more importantly, the companies have come to expect them." KIM HILL & EMILIO BRAHMST, CENTER FOR AUTOMOTIVE RESEARCH, THE AUTO INDUSTRY MOVING SOUTH: AN EXAMINATION OF TRENDS (2003) at *http://www.cargroup.org/pdfs/North-SouthPaper.PDF* at 12. This is certainly true in the automotive industry where states employ various tools in their efforts to persuade businesses to invest. The list of incentives offered by states

to entice businesses to invest locally includes tax abatements, job creation tax credits, site preparation assistance, subsidized land purchases, employee recruitment and training subsidization, and on and off-site infrastructure improvements. *Id.* at 11.

States do not use the available tools identically in their efforts to convince businesses to invest locally. Indeed, some of those tools are more available in one state than another. A state with good infrastructure and a skilled workforce but higher operating costs, such as wages or taxes, must rely more heavily on tax incentives to persuade businesses to invest there. A state that has less infrastructure and a less skilled workforce, but lower operating costs, may employ investments in infrastructure and training to convince an employer to invest, while not needing to rely to the same extent on tax incentives to create a package that is attractive to an employer.[2]

Historically, the various states' economies have developed differently and to a certain extent those differences are regionally related. In pointing out this distinction our aim is not to pit one region against another but rather to make clear that the states enter the competition for new jobs from varied positions. As a result, the Court of Appeals' decision, which simply does not take this factor into account, creates a situation in which the playing field has not been leveled but rather

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[2] In a comparison of incentive packages offered by northern and southern states, the northern states' incentive packages were made up of 83 percent tax abatements and 13 percent infrastructure improvements. The southern states used packages made up of only 38 percent tax abatements, while 44 percent of the incentives were provided through improvements to infrastructure and 18 percent through employee training, screening and recruitment. In raw numbers, this means that southern states are contributing $52 million more on infrastructure improvements than northern states and $23.2 million more for employee recruitment and training. *Id.* at 11.

has been tilted—even if unintentionally—in favor of some states.

What the Court of Appeals' decision has done is to take a tool away from the state of Ohio—namely its ability to utilize tax credits as incentives to encourage local investment—while leaving intact the various other tools that may be utilized by the states. Because the states find themselves in different positions in terms of what they may offer to encourage a business to invest locally, the inevitable result of the Court of Appeals' decision is to place a state like Ohio, that relies more heavily on tax incentives, at a disadvantage compared with a state that may employ other incentives like infrastructure improvements and investments in training, incentives that are not affected by the Court of Appeals' decision.

The scenario created by the Court of Appeals' decision leaves Ohio and any other similarly situated state in a troubling position. That is, in response, Ohio is faced with at least two equally problematic options. In order to remain competitive with other states, it might decide that it has to lower dramatically or abolish altogether its franchise tax, a result that would be a greater drain on state revenues than the incentives that are challenged in this case by the Respondents. Another option available to the state is to offer a package to DaimlerChrysler or another corporation that does not include the prohibited tax incentives. However, because of the unique economic circumstances of Ohio, that package is likely to fall far short of packages offered by other states because Ohio will not be able to make up for the lack of tax incentives with other permitted incentives. As a result, the business in question is likely to choose another state, the state that has offered it a more appealing package of incentives. What Ohio loses in this transaction, based on its inability to compete fairly, is striking.

The state has not just lost thousands of new jobs created by a facility like the Jeep Assembly Plant. It has lost thousands of highly paid jobs that offer pensions and healthcare. The average wage of an auto assembly worker is $69,500 annually. HILL & BRAHMST at 11. Moreover, because these jobs are highly paid, their impact on the state's economy is even more dramatic. In fact, for every auto assembly job created, 6.5 more jobs are created in the economy. *Id.* These numbers are more than mere statistics, they are tremendously important to a state like Ohio that lost 244,000 jobs (191,000 in manufacturing) in the period between November 1999 and November 2003 (JON HONECK, POLICY MATTERS OHIO, INTERNATIONAL TRADE AND JOB LOSS IN OHIO (2004) at *http://www.policymattersohio.org/trade.htm.*) and that has an unemployment rate of 6.1%. BUREAU OF LABOR STATISTICS, REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT (May 2005) at *http://www.bls.gov/news.release/pdf/laus.pdf*

If the evil intended to be addressed by the Court of Appeals' decision is discrimination against interstate commerce, then it seems particularly troubling that the result of its decision would be to place one state, such as Ohio, at such a disadvantage in its ability to compete for the kinds of good jobs created by new facilities like DaimlerChrysler's Jeep Assembly Plant.

It also bears note that the Respondents' challenge to the incentives at issue appears to be based on the assumption that such incentives cost the states more than they contribute. However, the evidence is to the contrary. The Center for Automotive Research (CAR) in Ann Arbor, Michigan indicates "that an incentive package paid to encourage an automaker to invest in a community is quickly recovered through tax revenues generated by jobs created, along with additional indirect or spinoff employment effects." HILL & BRAHMST at 12. The CAR's research offers the example of a facility built in Flat Rock, Michigan by Ford Motor Company. While the

state of Michigan and the City of Flat Rock offered $125 million in tax breaks to Ford, the state estimated that as a result of the investment, it would reap $850 million in taxes from the 1,945 workers employed in the facility as well as from the additional employees hired by the plant during the life of the agreement and by the 6,300 indirect jobs created by the money spent in the state's economy by the company and its employees. *Id.*

But our purpose here is not to debate the merits of tax incentives offered to investing businesses by the various states. Rather, our purpose is to highlight the very real consequence of the Court of Appeals' decision. That consequence is to create a situation in which some states are handicapped in their ability to compete for new business investment and jobs while other states remain relatively unimpacted in their ability to entice local investment. The UAW respectfully submits that this could not have been the intended consequence of the Court of Appeals' decision, a decision purportedly aimed at eliminating discrimination against interstate commerce, and that as a result, the Court of Appeals' decision invites review by this Court.

## CONCLUSION

Wherefore, the UAW respectfully requests that Daimler Chrysler Corporation's petition for a writ of certiorari be granted.

Respectfully submitted,

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# In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
*Petitioners*,

v.

CHARLOTTE CUNO, ET AL.,
*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* KENTUCKY CHAMBER OF COMMERCE, MICHIGAN CHAMBER OF COMMERCE, OHIO CHAMBER OF COMMERCE, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, DETROIT REGIONAL CHAMBER OF COMMERCE, AND TOLEDO AREA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

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## INTEREST OF *AMICI CURIAE*

This *amici curiae* brief in support of the petition of DaimlerChrysler Corporation is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for petitioners and respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The Kentucky Chamber of Commerce is the largest broad-based business association in Kentucky, representing more than 7,000 businesses.

The Michigan Chamber of Commerce is a non-profit membership organization which represents the interests and views of over 6,500 private corporations and businesses engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The Ohio Chamber of Commerce, founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate.

The Tennessee Chamber of Commerce and Industry is the state chamber of commerce and manufacturers' association, representing more than 1,000 members across Tennessee from all facets of business and industry.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* states that no counsel for any other party authored this brief in whole or in part and that no entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

The Detroit Regional Chamber of Commerce is a non-profit business advocacy organization, representing more than 21,000 businesses in Southeast Michigan.

The Toledo Chamber of Commerce is a broad-based non-profit membership organization in Toledo, Ohio, which represents more than 3,800 businesses.

Each of the above-listed organizations works to enhance the economy and business climate of the State or region it serves. All have a collective interest in this case because the court of appeals' decision has created legal uncertainty which will diminish the value and effectiveness of business tax incentives in Kentucky, Michigan, Ohio, and Tennessee and will thereby hinder industrial development in those States.

## INTRODUCTION

The Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, Tennessee Chamber of Commerce and Industry, Detroit Regional Chamber of Commerce, and Toledo Area Chamber of Commerce (the "Chambers") submit this brief as *amici curiae* to urge this Court to grant the petition filed by DaimlerChrysler, seeking *certiorari* pursuant to Rule 12 of the Supreme Court Rules. *Amici* submit this brief to make the Court aware of the confusion and uncertainty created by the court of appeals' decision, and the need for the Court to clearly resolve the issue inasmuch as the court of appeals has decided an important federal question in a manner which directly contradicts the holding of the Michigan Supreme Court.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

It would be difficult to overstate the adverse impact that the decision of the court of appeals in this case can be expected to have upon the economies of Tennessee, Kentucky, Ohio, and Michigan unless it is reversed by this Court. The court of appeals' decision represents a radical departure from existing Commerce Clause jurisprudence and fails to address the directly contrary holding of the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992). Abandoning this Court's focus on whether a statute's economic impact places an impermissible burden on interstate commerce, the court of appeals' decision centers instead around a formalistic distinction between credits and subsidies. In so doing, the decision at once casts a general pall of doubt over all tax credit incentive programs in the Sixth Circuit while providing little guidance that businesses and State officials can use in crafting their incentive policies in a manner that can be depended upon by domestic and foreign investors. *Amici* therefore respectfully submit that this case presents "compelling reasons" for *certiorari* under Rule 10 of the Supreme Court Rules.

## REASONS FOR GRANTING THE WRIT

### I. THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF THE MICHIGAN SUPREME COURT.

The court of appeals' decision fails to address the directly contrary holding of the Michigan Supreme Court in *Caterpillar v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), which found that a virtually identical statute providing a tax deduction designed to encourage capital investment in Michigan did not violate the dormant Commerce Clause. The Michigan law at issue in *Caterpillar* provided a deduction from the State's business tax for "capital acquisitions related to the Michigan business activity." *Id.* at 186. Caterpillar, Inc. challenged the Michigan tax deduction, claiming that it discriminated against interstate commerce because it apportioned the deduction based only on the taxpayer's property and payroll, and excluded an additional factor—sales—used to calculate Michigan's business tax. *Id.* at 192. Thus, it was Caterpillar, Inc.'s contention that the deduction was unconstitutional because it discriminated against companies doing business in Michigan which did not locate their property and employees in Michigan. *Id.*

The Michigan Supreme Court rejected Caterpillar, Inc.'s argument, citing this Court's decision in *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991), and upheld the statute. Like the Ohio tax credit at issue, the Michigan deduction was designed to make Michigan attractive to investors vis-a-vis other States and to induce industrial investment there. The Michigan Supreme Court very directly rejected Caterpillar, Inc.'s contention that this statute "[wa]s

discriminatory because it was enacted to promote investment in Michigan," emphasizing that "States are free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Caterpillar*, 488 N.W.2d at 192 (quoting *Boston Stock Exch. v. State Tax Comm'n.*, 429 U.S. 318, 336-37 (1977)).

In so holding, the Michigan Supreme Court cautioned that "we must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize." *Id.* at 188, n. 25 (quoting *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444-45 (1940)). In this case, the court of appeals strikes down an Ohio statute that provides tax benefits for the same activity—investment in machinery—for the same purpose—inducing in-state investment—as that upheld in *Caterpillar*. Yet the court of appeals' opinion in no way addresses the Michigan Supreme Court's decision in *Caterpillar*, nor does it provide any basis whereby courts in the States comprising the Sixth Circuit[2] can harmonize the two dissonant decisions. Thus, the validity of a given incentive statute currently depends, at least in the State of Michigan and perhaps as well in Ohio, Kentucky, and Tennessee, entirely on whether it is challenged in State or federal court.

The court of appeals' decision in this case is in direct conflict with the decision of the Michigan Supreme Court in *Caterpillar*. This conflict presents a compelling reason for

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[2] State tax challenges typically come up through State courts. That the parties ended up in Federal Court in this case is an anomaly.

granting the petition for *certiorari* in this case in accordance with Rule 10(a) of the Supreme Court Rules.

## II. THE UNCERTAINTY CREATED BY THE COURT OF APPEALS' DECISION PRESENTS A GRAVE AND IMMEDIATE THREAT TO ECONOMIC DEVELOPMENT WITHIN THE SIXTH CIRCUIT.

Regardless of how the Commerce Clause issue in this case may ultimately be decided, in the interim the four States comprising the Sixth Circuit will suffer the disadvantage of uncertainty in their efforts to induce industry to locate within their borders. There should be no doubt or mistake about the significance of the disadvantage under which these four States will labor. The availability of valuable tax incentives as an inducement to those who have the decision-making power to locate these manufacturing facilities and jobs in one State rather than elsewhere is a question of utmost public interest, not only to the businesses, but also to their employees and vendors, and to the communities in which they are located. The business people who decide where to invest substantial amounts of capital in locating or expanding manufacturing facilities need clarity and certainty of the law to determine with assurance the level of tax benefits available through the tax incentive legislation offered by a State. Uncertainty and doubt are the enemies of decision—and the citizens of Kentucky, Michigan, Ohio, and Tennessee are ill-served by doubt on the part of decision makers when the likely consequence of that doubt is either no decision to move to or expand jobs in those States, or a decision to locate (or even worse to relocate) in a State outside of the Sixth Circuit—or

even outside of the United States[3]—where the law critical to the decision path is free from doubt.

No doubt the legal academicians and well-meaning private citizens who are the proponents of the result so far reached in this case by the court of appeals believe that this result serves the greater good by leveling the playing field among the various States and avoiding the necessity that a State give up tax revenues by giving manufacturers tax credits as an incentive to locate manufacturing facilities in that State. However laudable, though misguided, that goal may be, the flaw is that the playing field they seek to level is the world, not just fifty States. The likely result of Ohio not being able to offer tax incentives to DaimlerChrysler to create or keep jobs in Toledo as a consequence of this case is not just that those jobs will migrate to Alabama or Georgia, but that they will likely leave the United States altogether. What is especially egregious about this "beggar thy neighbor" outcome is that by and large the tax incentives offered by the various States do not come out of existing State tax revenues, but represent tax revenues foregone from activity that would not occur in the State but for the tax incentives.

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[3] Decisions involving plant site locations for major multinational manufacturing corporations take into consideration not only United States sites, but sites in Mexico, Canada, and elsewhere.

## III. THE COURT OF APPEALS' DECISION IS GROUNDED IN A FORMALISTIC DISTINCTION BETWEEN CREDITS AND SUBSIDIES—A RADICAL DEPARTURE FROM EXISTING COMMERCE CLAUSE JURISPRUDENCE WHICH INDISCRIMINATELY SHROUDS VIRTUALLY ALL TAX CREDIT INCENTIVE PROGRAMS IN THE SIXTH CIRCUIT WITH CONSTITUTIONAL UNCERTAINTY.

The court of appeals' opinion breaks new ground. Even though tax incentives similar to those implicated in this case have been in place for more than 20 years in many, if not most, States,[4] until the court of appeals' decision was issued neither any State supreme court, nor any federal court of appeals, nor this Court had ever held that a job creation/industrial investment tax credit incentive in the form at issue in Ohio violated the Commerce Clause. The court of appeals has acknowledged as much, noting that "[t]he United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes." *Cuno v. DaimlerChrysler*, 386 F.3d 738, 743 (2005). Literally billions of dollars have been invested in reliance upon and belief in the constitutional validity of the tax incentives provided by agreements of the sort at issue in this case.

If, as the court of appeals' decision suggests, an incentive's validity in the Sixth Circuit now turns, at least in

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[4] *See generally*, Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (May 1996) (noting *inter alia*, that "[t]oday, every state provides tax and other economic incentives as an inducement to local industrial location and expansion").

federal court, on the entirely formalistic distinction between credits and subsidies, then the court of appeals should have explained that important departure from existing law so that businesses and State officials could properly evaluate whether to begin the laborious process of re-crafting the numerous incentive programs that legislatures have enacted in the form of credits. As Professor Hellerstein observes in the Cornell Law Review article prominently quoted throughout plaintiffs' (respondents in this Court) briefs, there is no economic substance to the credits/subsidies distinction that, ultimately, is the touchstone of the court of appeals' decision. Hellerstein, *supra* note 4, at 21 ("Economists know that the real-world impact of such a subsidy mirrors the effect of the credit"). In recognizing that Ohio could have constitutionally granted subsidies to DaimlerChrysler with the same value as the tax credits it struck down as violative of the Commerce Clause, the court of appeals' decision breaks dramatically with this Court, which has explicitly and consistently "eschewed [such] formalism for a sensitive, case-by-case analysis of purposes and effects" when evaluating business incentives. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

Tellingly, the court of appeals' decision must resort to artificial distinctions because without them its opinion would plainly expand the Commerce Clause into areas of purely intra-state activity on which, as this Court has recognized, it has no bearing.[5] The decision accepts the plaintiffs' position

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[5] For example, in *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), this Court unanimously upheld the constitutionality of a state flat $100 fee on trucks engaged in intrastate commercial hauling. Out-of-state trucking companies which occasionally did "top offs" (short purely intrastate hauls) argued that the unapportioned fee

that the Ohio machinery credit at issue is unconstitutional because "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states." *Cuno*, 386 F.3d at 745. If that were the proper test, virtually any credit or subsidy or, for that matter, any road, convention center or other investment designed to make a State more advantageous to business investment vis-a-vis other States would be constitutionally suspect. As Justice Stevens has observed, the Constitution simply does not "inhibit a State's power to experiment with different methods of encouraging local industry" in this way; "*[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.*" *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (emphasis supplied) (Stevens, J., concurring). What makes a statute unconstitutional under existing Supreme Court jurisprudence is the "burden" on interstate commerce resulting from protectionism through imposition of tariffs or toll-based duties on interstate sales and movements, such as the credit schemes struck down in *Maryland v. Louisiana*, 451 U.S. 725 (1981) and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). This is the distinction so carefully articulated by this Court in *New Energy Co. of Ind. v. Limbach*; "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but *only action of that description in connection with the State's*

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discriminated against them because they paid the same amount as in-state companies that did nothing but intrastate hauls. This Court gave short shrift to this argument, observing that "[n]othing in [the Court's] case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause." *Id.* at 2421.

*regulation of interstate commerce.*" 486 U.S. 269, 278 (1988) (emphasis supplied). By abandoning that crucial distinction, the court of appeals' decision throws the Commerce Clause jurisprudence within the Sixth Circuit into confusion and leaves State and private actors with no economically meaningful test for determining the validity of any given incentive statute.

## IV. AS IN *QUILL CORP. V. NORTH DAKOTA*, THIS COURT SHOULD DEFER TO CONGRESS THE COMMERCE CLAUSE PUBLIC POLICY ISSUES ARISING OUT OF STATE AND LOCAL BUSINESS TAX INCENTIVES.

By granting the petition of DaimlerChrysler and reversing the court of appeals, this Court can take into consideration the "substantial reliance" by countless industry and public officials on longstanding tax incentives and properly "leave essentially legislative judgments to the Congress" regarding the benefits and burdens on interstate commerce created by such incentives. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 877-898 (1988) (Scalia, J., concurring in Judgment). This Court should follow the fair and prudent course set by it in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, this Court was called upon to address whether the Commerce Clause prohibited States from taxing out-of-state mail order vendors. *Id.* Noting that existing precedents had "engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry," the Court declined to reverse its longstanding position that mail order businesses could not be taxed by States in which they had no physical presence. *Id.* at 317 (emphasis supplied). Important to this Court's determination was the recognition that

> [t]his aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our decisions.

*Id.* at 318. Would it therefore not be better that this Court similarly safeguard the reliance interests of manufacturers who have invested substantial sums induced to do so by significant tax incentives?

Certainly, the reliance interests implicated in this case are far weightier than those protected by this Court in *Quill*. *Quill* involved a single industry; the court of appeals' decision in this case calls into question a vast framework of incentives relied on by manufacturers operating in virtually every State in the Union. *See* Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997).

As in *Quill*, this Court should grant certiorari and reverse the decision below, thereby leaving to Congress the task of balancing these extensive reliance interests, as well as the significant economic benefits that have motivated State legislatures to adopt the incentives on which industries now rely, against the anti-incentive policy agenda advocated by the plaintiffs. While this case does not involve, as did *Quill*, a question of law as to which this Court has directly spoken, it does involve an issue as to which informed taxpayers could reasonably infer from this Court's precedents that tax incentives such as those at issue were well within acceptable limits set under the Commerce Clause. Even the plaintiffs concede that this Court's dormant Commerce Clause

jurisprudence does not directly mandate the court of appeals' decision to strike down the most commonly available type of business tax incentive in the United States. *See* Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL LAW REV. 789, 805 (1996). Indeed, the plaintiffs themselves characterize their position as a "novel legal theory." (No. 01-3960, *Cuno v. DaimlerChrysler Corp. (6th Cir.), Pl. Br. at viii)*.

This Court has recognized that "novel legal theories" of State taxation with broad national application are best tested, evaluated and enacted by Congress. *Quill*, 504 U.S. at 318 (refusing to adopt an "economic" rather than "physical" presence nexus requirement); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278-280 (1978) (refusing to mandate a formula to apportionment of income of multi-state enterprises on the grounds that such action would necessitate "extensive judicial lawmaking"); *see also, Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 621 (1997) (Thomas, J., dissenting) ("the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious State taxes on interstate commerce ... and leaves to Congress the policy choices necessary for any further regulation of interstate commerce"). As in *Quill* and *Moorman*, this Court should decline plaintiffs' invitation to impose such a novel legal theory on the States by judicial fiat and thereby avoid opening the Pandora's Box of when and to what extent the novel theory must or should be given retrospective effect. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *see also*, Hartman and Trost, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2D, § 7.5, pp. 64-104 (Thompson West, 2003)(analyzing cases addressing the validity of claims for retroactive relief).

Business development incentives are an area of law particularly suited to Congressional action. Unlike this Court, which must address the specific facts and statute at issue, Congress can create a national scheme which broadly addresses such incentives either by banning them or placing all or certain types of incentives in protected safe harbors.[6] Such a scheme will not only place States in all Circuits on an equal footing but will immediately increase the value of those incentives to both the States and the businesses that rely on them by eliminating the legal uncertainty created by the decision of the court of appeals. Congress is also in a unique position to address the reliance interests of those taxpayers that have made substantial investments in reliance on such incentives, often after evaluating opportunities in many competing States and nations. To the extent Congress agrees with the plaintiffs that, irrespective of the opinion of legislatures throughout the United States, certain incentives are bad public policy, it can readily enact "grandfather" or "sunset" provisions carefully tailored to preserve tax benefits for which taxpayers have already bargained.

A decision of this Court reversing the holding of the court of appeals will leave Congress, should it so choose, free to form a national policy on business development incentives. As this Court observed in *Quill*, "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that the better part of valor is to respect the judgment of the other branches of government." *Quill*, 504 U.S. at 318-319

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[6] A bill has been introduced in Congress to protect commonly used incentives, including credits for in-state investment of the sort challenged in this litigation, from Commerce Clause challenge. S. 2881, 109th Cong., 1st Sess. (2005).

(quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637-638 (1992)).

## CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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OFFICE OF THE CLERK

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No. 04-1704 & No. 04-1724

# In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

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WILLIAM W. WILKINS, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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Brief Of *Amici Curiae* Louisville Area Chamber of Commerce, Inc., Greater Cincinnati Chamber of Commerce, Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce & Tri-County Economic Development Corp., Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson City/ Jonesborough/Washington County Chamber Of Commerce & Economic Development Board, & Kingsport Area Chamber of Commerce In Support Of Ohio Petitioners' and DaimlerChrysler Corp.'s Petitions For Writ Of *Certiorari*

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**Brief of *Amici Curiae* Louisville Area Chamber Of Commerce, Inc., Greater Cincinnati Chamber of Commerce, Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce & Tri-County Economic Development Corporation, Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board, and Kingsport Area Chamber of Commerce In Support of Ohio Petitioners' and DaimlerChrysler Corporation's Petitions for Writ of Certiorari**

## INTEREST OF *AMICI CURIAE* IN THIS CASE[1]

### Identification of the *Amici Curiae*

Louisville Area Chamber of Commerce, Inc. (d/b/a Greater Louisville Inc.), Greater Cincinnati Chamber of Commerce (d/b/a Cincinnati USA Regional Chamber), Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce and Tri-County Economic Development Corporation, Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson

[1] Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* Urban Chambers state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than the *Amici Curiae*, their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for all Petitioners and Respondents have consented to the filing of this brief.

City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board, and Kingsport Area Chamber of Commerce (collectively, the "Urban Chambers") represent thousands of businesses in their metropolitan areas. The Urban Chambers and their members are engaged in business in Ohio, Kentucky, and Tennessee, and thus have a particular interest in the ultimate resolution of the constitutionality of Ohio's investment tax credit. Ohio's investment tax credit in no way violates the Commerce Clause, and, accordingly, the Sixth Circuit's decision should be reversed.

Greater Louisville Inc. is the metro chamber of commerce and economic development agency representing approximately 2,400 businesses and organizations in the Louisville, Kentucky – southern Indiana metropolitan area.

Cincinnati USA Regional Chamber is the nation's fifth largest chamber, representing the interests of more than 6,000 member businesses with approximately 380,000 employees in 15 counties in southwestern Ohio, northern Kentucky, and southeastern Indiana.

The Nashville Area Chamber of Commerce represents approximately 3,300 member businesses and 249,000 employees in a 10-county region in middle Tennessee.

Commerce Lexington, Inc. promotes economic development, job creation, and overall growth in Lexington, Kentucky and its neighboring communities. It includes over 1,800 member companies and over 3,700 business professionals.

Scott County United Inc. has 527 active members in Georgetown, Kentucky and surrounding areas, promoting and coordinating local economic development.

The Northern Kentucky Chamber of Commerce seeks to expand and develop business for a steadily rising tri-state region with a workforce of over 1 million in northern Kentucky and Cincinnati. It represents 1,900 business members consisting of regional, national, and international companies. Tri-County Economic Development Corporation is the primary economic development marketing agency and the primary entity for the retention and expansion of existing industries in Boone, Kenton, and Campbell Counties in northern Kentucky.

The Knoxville Area Chamber Partnership is a private, nonprofit, membership-driven organization focusing on economic development. Comprised of more than 1,700 member businesses, its primary focus is to drive regional economic prosperity. As the leading economic development agency for both the City of Knoxville and Knox County, Tennessee, the chamber focuses on generating business opportunities and creating an environment for networking and sustained prosperity.

The Chattanooga Area Chamber of Commerce brings Chattanooga, Tennessee-area businesses together in support of economic growth and initiatives that support the community. The Chattanooga Area Chamber of Commerce has more than 1,700 members, ranging from single employee operations to companies with more than 2,000 employees. It provides a range of services that support the expansion of existing industry, entrepreneurial activity, and business recruitment.

The Memphis Regional Chamber of Commerce is the leading economic development organization for the three-state, eight-county Memphis metropolitan area. The nearly 2,400 companies that comprise its membership range from large international companies having over 30,000 local employees to one-person businesses.

The Johnson City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board provide services to the business community in the State of Tennessee's fourth largest metropolitan area. With nearly 900 members, its purpose is to promote economic and community development. The Board serves as an industrial/business recruiter, with a principal mission of promoting economic development.

The Kingsport Area Chamber of Commerce is a private, non-profit business organization comprised of nearly 1,000 business members in northeast Tennessee. Its goal is to utilize its resources to focus efforts on enhancing a strong and viable business environment for the Kingsport, Tennessee area.

**The *Amici Curiae*'s Interest**

If the lower court's ruling is permitted to stand, Ohio, Kentucky, Tennessee, Michigan, and these *Amici* could be outsiders deprived of the chance to compete freely in economic development activities with the other 46 States, as well as internationally.

The Urban Chambers are on the front lines of economic development activities for a global economy that starts, lives, and dies on the local level. Accordingly, the Urban Chambers have a keen interest in the outcome of this case because they are constantly involved in economic development, job creation, and brownfield revitalization in their respective states, regions, and metropolitan areas. They can explain the profound adverse effects on local communities that the Sixth Circuit's incorrect interpretation of the Commerce Clause will have, absent a grant of *certiorari* and reversal.

The Sixth Circuit's opinion undermines the Urban Chambers' ability to engage in the economic competition that is the underlying goal of the Commerce Clause. *See Bacchus Imps. v. Dias*, 468 U.S. 263, 272 (1984) ("[C]ompetition among the States for a share of interstate commerce is a central element of our free-trade policy."). Until this Sixth Circuit opinion, all states were "free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Caterpillar, Inc. v. Dept. of Treasury*, 440 Mich. 400, 424, 488 N.W.2d 182, 192 (1992) (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336-37 (1977)). Even the Respondents agree that it is "vital for this Court to step in to resolve the conflict among the circuits, so that businesses will be able to make well-informed decisions about where to locate new facilities, and so that state and local governments will be able to design and offer incentive packages that comport with constitutional requirements." *See* Cuno, *et al.*'s Petition for Writ of Certiorari, Case No. 04-1407, at 19.

## STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals overturned Ohio's statutory investment tax credit program, which was designed to encourage all manufacturers, both in and outside of Ohio, to make capital and other job creating investments in Ohio. In exchange for any manufacturer making a qualifying investment in Ohio, the program provided a credit against the manufacturer's Ohio franchise tax liability, which otherwise would necessarily increase due to the new capital investment. The program applies equally to all manufacturers regardless of their state of incorporation, principal place of business, or location of other facilities or operations. Moreover, the investment tax credit program placed no burden upon manufacturers that chose to invest their resources in other locations outside of Ohio. Nevertheless, the Sixth Circuit accepted the plaintiffs-

respondents' admittedly novel theory to find this tax program in violation of the Commerce Clause.

## SUMMARY OF ARGUMENT

This case presents a significant issue for cities, businesses, and workers nationwide, because the Sixth Circuit's ruling creates a conflict between that court, the Michigan Supreme Court, and this Court's precedent. That conflict strikes at the heart of States' abilities to employ common tax incentive programs as means of encouraging economic development and job creation. As it stands now, the Sixth Circuit's ruling creates, rather than remedies, an undue burden on interstate commerce.

First, states are constitutionally permitted to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "a discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W. 2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37). As supported by a wide range of data regarding new investments and thousands of newly created jobs, the Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect.

Second, the Sixth Circuit's decision is a departure from prior Supreme Court jurisprudence interpreting the dormant Commerce Clause. *See Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385-86 (1991); *Bacchus*, 468 U.S. at 272; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407 n. 12 (1984). This Court has consistently ruled that States may structure their tax codes and provide economic development incentives as mechanisms for competition amongst themselves. The Sixth Circuit's ruling abandoned that precedent, and wholly failed to identify any grounds for

the adoption of plaintiffs-respondents' novel application of the Commerce Clause. In addition, the Sixth Circuit's ruling creates a direct conflict with the Michigan Supreme Court's decision in *Caterpillar*. In *Caterpillar*, the Michigan Supreme Court addressed a similar dormant Commerce Clause attack on a state investment tax credit, and found that tax credit to comply with this Court's rulings and guidance. Therefore, inconsistent rulings place States within the Sixth Circuit on an uncertain foundation and at a disadvantage relative to the remaining 46 States that remain free to employ such long-accepted economic development tools.

Third, this Court has previously stated that a state tax program must have internal consistency, *i.e.*, it "must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). In the context of this case, virtually every State employs tax incentives for promoting economic development. Regardless of arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade. Ironically, interference with free trade will arise only if the Sixth Circuit's opinion stands, thereby prohibiting Ohio, and possibly Kentucky, Tennessee, and Michigan, from utilizing the competitive tools that remaining States have used for decades and continue to use.

## ARGUMENT

Review of this matter is essential. That review could easily (1) enforce the notions of federalism recognized by this Court that permit States to encourage domestic commerce; (2) resolve conflicting rulings that now exist within the Sixth Circuit; and (3) prevent the Sixth Circuit's ruling from significantly interfering with interstate commerce and free trade.

### 1. The purpose of Ohio's tax credit is to encourage domestic industry.

Ohio's investment tax credit does not have a discriminatory purpose. The Ohio investment tax credit is open and available to any manufacturer that chooses to do business in Ohio. It applies equally to all manufacturers regardless of where else they may choose to do business. Moreover, the "design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state" is a "laudatory goal" recognized by this Court. *Trinova,* 498 U.S. at 385-86 (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336 (1977)). This Court recently reiterated that constitutional deference by confirming that "[o]ur earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." *Kelo v. City of New London,* 125 S.Ct. 2655, 2005 U.S. LEXIS 5011, at *24 (2005). In the Commerce Clause context that translates into States being free to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.,* 429 U.S. at 336-37; *Caterpillar,* 488 N.W. 2d at 192; *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability.").

#### a. State tax incentives encourage domestic industry by promoting brownfield revitalization

Federal and state policy (both of which are implemented on the local level) have long encouraged and incentivized businesses to invest in existing facilities as a way to stem development onto undeveloped land. As urban chambers of commerce, these *Amici Curiae* are on the front lines of promoting and administering these important

policies, yet without state legislation they are virtually powerless to effectively address the problem. One commentator summarized this "brownfields redevelopment" issue as follows:

> [B]rownfield sites continue to litter America's urban landscape, leading federal, state and local policymakers to turn to more broad-based environmentally impaired properties. Familiar to economic development officials and those who finance projects in designated revitalization and empowerment zones, newly adopted brownfield incentives take the form of property tax abatements, low-interest loans, grants, and expensing of project costs for income tax purposes. . . . [This] movement toward government tax and financial incentives reflects a recognition of the larger community interest in successful brownfields redevelopment....[2]

If those goals are not pursued on a local level, they may not get implemented at all. "[S]tates may be more willing than the federal government to supply necessary funds or offer incentives in order to facilitate cleanup. States are especially motivated because empty brownfields do not contribute to the tax base of the states' communities."[3]

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[2] Scott Sherman, "Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer's Pro Forma," 11 N.Y.U. ENVTL. L.J. 317, 318 (2003).

[3] Brian Thomas Lang, "Note: Ohio's Voluntary Action Program: Solving Ohio's Toxic Waste Woes?" 60 OHIO ST L.J. 285, 286 (1999) (citing Andrea Lee Rimer, "Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment," 10 TUL. ENVTL. L.J. 63, 106 (1996) ("Mayors of thirty- three cities

These laudable policies encourage businesses to keep jobs close to the people who need them most, to attract capital investment, and to modernize existing manufacturing buildings. *Caterpillar*, 488 N.W.2d at 192 (citing *Boston Stock Exch.*, 429 U.S. at 336-37). These policies support state and local tax incentive programs and are of exceptional public importance to every citizen, community, and local government. Therefore, state and local tax incentives are a common and useful tool, because they directly address and promote each of these policy considerations. Rather than consider those purposes and economics, the Sixth Circuit improperly rejected those interests. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (stating that the Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects" when evaluating business incentives).

**b. State laws that fairly encourage in-state business and domestic industry do not have a discriminatory effect on interstate commerce**

The Commerce Clause permits states to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "[a] discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W.2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37)). Directly responsive to that authority, the Sixth Circuit recognized that Ohio's investment tax credit had the "same economic effect" as tax programs that this Court ruled "do[ ] not ordinarily run

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estimated lost tax revenues of $131 million due to undeveloped brownfields. . . . Without programs designed to reinvigorate brownfields in inner cities, industry will continue to move to greenfields-pristine land surrounding suburbs and localities will continue to lose valuable property taxes critical to educate children and maintain infrastructure.")).

afoul" of the dormant Commerce Clause, such as subsidies. *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004); *see also West Lynn Creamery*, 512 U.S. at 199, n.15 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)). Yet, contrary to that finding, the Sixth Circuit still concluded that Ohio's statute had a discriminatory effect. The reality is that the only discriminatory effect that could result is if the Sixth Circuit's ruling is permitted to stand. *See Hughes v Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (the lower court's "novel interpretation of the 'burden' concept represented a departure which, had it been accepted, would impair rather than protect interstate commerce.").

Economic development, and therefore increased domestic industry, occurs "'when a local economy is vitalized, for example, by the creation of a job that is supported by external resources.'"[4] Basic economic theory recognized by the federal government, States, municipalities, and economic developers further establishes that direct job creation data must be multiplied many times to truly understand the far-reaching benefits of new business development.[5] When viewed in light of those economic

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[4] Kathleen A. Norat & Eileen M. Lomoriello, "Clawbacks: A Help or A Hindrance in Negotiating Incentive Benefits?" J. MULTISTATE TAX'N & INCENTIVES, 2004 WL 335216 at *27 (Feb. 2004) (citing Economic Development Today: A Report to the Profession (American Economic Development Council, 1984)).

[5] *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.); Elizabeth Weissman & Catherine G. Ware, "A Holistic Approach to Business Relocation and Expansions," J. MULTISTATE TAX'N & INCENTIVES, 1999 WL 1711518 at *31 (Aug. 1999) ("Most communities recognize that the creation of new jobs and the expenditure of significant capital result in the attraction of ancillary, new industries to a community, commonly referred to as the multiplier effect.") (citing Deming, Quality, Productivity, and Competitive Position (1982)).

realities, States' successes in encouraging intrastate commerce, growth, and development is easily illustrated by recent data on the direct and multiplier effects of state tax incentive programs from within the Urban Chambers' states.

From 1997 to the present, the Commonwealth of Kentucky has generated over $10.8 billion in capital investment as a result of its tax credits and wage assessment programs with the creation of over 54,000 direct jobs in the manufacturing sector and over 20,000 direct jobs in the non-governmental services sector. The manufacturing jobs generate an estimated annual payroll of $1.6 billion, and the service sector jobs generate an estimated annual payroll of $851 million. Applying recognized economic modeling,[6] these jobs result in an economic impact that includes over 138,000 indirect and induced jobs in the Commonwealth and additional indirect and induced annual earnings of $2.7 billion in the Commonwealth. The total economic impact on the state from these programs includes over 213,000 total jobs and $5.1 billion total earnings.[7]

From 1997 through 2002, the State of Tennessee generated over $17 billion in capital investment as a result of its tax credit programs with the creation of over 39,000 jobs in the manufacturing sector and 55,500 jobs in the non-governmental services sector. These jobs generate an estimated annual payroll of $4.17 billion. Applying the same methodology, these jobs result in an economic impact that includes over 109,000 indirect and induced jobs in the State

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[6] The Minnesota IMPLAN Group, Inc.'s IMPLAN System was used and is similar to the U.S. Department of Commerce's methodology for estimated the economic impact of new investment. *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.).

[7] These analyses are based on data obtained from the Kentucky Cabinet for Economic Development.

and additional indirect and induced annual earnings of $2.4 billion in the State. The total economic impact on the State from these programs includes over 204,000 total jobs and $6.6 billion total earnings.[8]

Therefore, the full beneficial measure of these programs cannot be overstated. They are invaluable to job and earnings creation, domestic industry, and other economic benefits to the Urban Chambers and their members.[9] Removal of this economic development tool will place an undue burden on States and local chambers of commerce as they promote economic development, domestic business, and interstate commerce. However, given the Sixth Circuit's treatment of this case, that information and evidence was not even considered.

**c. The record below does not support a summary finding that Ohio's tax incentive had a discriminatory purpose or effect.**

The District Court dismissed this matter on the pleadings under Federal Rule of Civil Procedure 12(b). The Sixth Circuit necessarily accepted the plaintiffs-respondents' appeal of the matter with that procedural posture. Nevertheless, based upon the plaintiffs-respondents' mere allegations regarding the purpose and effect of Ohio's tax credit, the Sixth Circuit summarily granted judgment to

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[8] These analyses are based on data obtained from the State of Tennessee. Tennessee's data is based upon an aggregation of jobs into two categories-manufacturing and non-manufacturing.

[9] *See* Sherman, *supra* note 2, at 370-71 ("Success stories abound, from a new urban baseball stadium on the site of a former rail yard to a vibrant mixed-use complex in the heart of the central business district. In each of these ventures, the various incentives – regarding developers willing to take on these projects notwithstanding the greater risks involved – no doubt helped to move them from concept to reality.").

plaintiffs-respondents and enjoined Ohio from applying its tax incentive program.[10] Absent evidence by plaintiffs-respondents of a discriminatory purpose or effect, summary disposition in their favor was improper. *Trinova*, 498 U.S. at 385-86 ("Neither Trinova nor the secondary sources it relies upon present any evidence that the SBT was inspired as a way to export tax burdens or import tax revenues.").

Therefore, the appropriate resolution is to (a) recognize, as a matter of law, the legitimate purpose and effect of these state tax incentives or (b) require plaintiffs-respondents to submit evidence that meets their burden of proof on that issue, which petitioners, of course, would have an opportunity to rebut and would likewise be able to present their own evidence.

**2. The Sixth Circuit Court of Appeals decided an important Commerce Clause question in a way that conflicts with the Michigan Supreme Court and significantly departs from this Court's long-standing precedent.**

In what should have ended the analysis entirely, the Sixth Circuit acknowledged that the Ohio investment tax credit is "equally-available to in-state and out-of-state businesses." *Cuno*, 386 F.3d at 743. In *Complete Auto Transit, Inc. v. Brady*, this Court established the four-part test for analyzing state tax programs under the Commerce Clause. 430 U.S. 274, 279 (1977). In the lower court, plaintiffs-respondents challenged the Ohio statute on only one of those four elements. That is, the parties did "*not* dispute that the tax provisions at issue have sufficient nexus

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[10] The Sixth Circuit has stayed enforcement of its ruling and injunction pending resolution of the parties' petitions for writs of *certiorari*.

with the state, are fairly apportioned, and are related to benefits provided by the state." *Cuno*, 386 F.3d at 742 (emphasis added). The plaintiffs-respondents' only contention was that Ohio's investment tax credit discriminates against interstate commerce. That limited constitutional challenge controls here and compels review and reversal.

As this Court pronounced, "[a]t least in the interstate commerce context . . . the antidiscrimination principle has not in practice required much in addition to the requirement of fair apportionment." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983). In this case, the plaintiffs-respondents provided no supporting evidence. Yet, contrary to *Container Corp.*'s guidance, the Sixth Circuit found discrimination where none existed.

In addition, the Sixth Circuit's opinion is directly opposite that of the Michigan Supreme Court in *Caterpillar*, addressing the constitutionality of a virtually identical state tax credit program. There, the court addressed a statutory deduction from Michigan's single business tax related to the acquisition of capital assets. Even though the deduction applied only to "capital acquisition related to Michigan business activity," the Michigan Supreme Court found no discrimination under the Commerce Clause. The Michigan court found that no discriminatory purpose was implicated because "the promotion and development and investment of business" in a state does not violate the Commerce Clause. *Caterpillar*, 488 N.W.2d at 192. In addition, the Michigan court found no discriminatory effect because the tax incentive was "available for any taxpayer." *Id.*

With essentially the same facts, the Sixth Circuit and the highest court of Michigan reached opposite conclusions. That alone is sufficient grounds for granting a writ of

*certiorari* to review and correct the conflicting rulings. Supreme Court Rule 10(a).

### 3. Ohio's tax credit does not interfere with free trade among the states.

While the economic incentive programs offered by Ohio's sister states are distinguishable from Ohio's investment tax credit, the Sixth Circuit's decision threatens to create significant uncertainty and adverse economic consequences for States, cities, and businesses throughout the Sixth Circuit and the country. Based upon the plaintiffs-respondents' admittedly novel theory, the Sixth Circuit fundamentally altered Commerce Clause jurisprudence, threatening the viability of economic development programs throughout the country, preventing the Urban Chambers from fairly competing in the global economy, and placing an undue burden on interstate commerce.

In general, "constitutionality under the Commerce Clause ... depends upon the practical effect" of the tax. *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Complete Auto Transit*, 430 U.S. at 279. For state tax programs in particular, this Court has stated that they must have internal consistency, *i.e.*, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). Virtually every state employs tax incentives for promoting economic development. And regardless of any arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade or harming any citizen or

taxpayer.[11] The interference with free trade comes only by means of the Sixth Circuit's opinion prohibiting Ohio from employing the competitive tools used for decades and available to the remaining States.

As illustrated by the job creation and economic impact data provided in Section I.b. above, neither the Ohio investment tax credit nor the tax incentives of its nearby sister states have interfered with free trade. Rather, far from impeding interstate commerce, the added investments and accompanying multiplier effect have generated significant commerce, including a substantial number of jobs. The end result, prior to the Sixth Circuit's decision, was that all States were benefiting from increased business operations in their home territory attained via interstate competition. This is no longer possible if the Sixth Circuit's decision is not reviewed and, ultimately, reversed.

## CONCLUSION

The Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect. The Court should grant the Ohio Petitioners' and DaimlerChrysler's petitions for writ of *certiorari* and reverse the Sixth Circuit's ruling on the constitutionality of Revised Code § 5733.33.

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[11] Professor Enrich stated that citizens/taxpayers, such as the Respondents, "can point to no direct reduction of [their] tax liability or any assured expansion of services that the elimination of the challenged tax break would yield." Peter D. Enrich, "Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 HARV. L. REV. 377, 414 (Dec. 1996).

July 20, 2005

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# In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
*Petitioners*,

v.

CHARLOTTE CUNO, ET AL.,
*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICUS CURIAE* MICHIGAN ECONOMIC DEVELOPMENT CORPORATION IN SUPPORT OF PETITIONERS DAIMLERCHRYSLER CORPORATION, AND STATE OF OHIO

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## INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Michigan Economic Development Corporation ("MEDC") is a public body corporate created under section 28 of Article VII of the State of Michigan Constitution of 1963, and the Urban Cooperation Act of 1967, 1967 PA 7, MCL 124.501 to 124.512, by contractual interlocal agreement effective April 5, 1999 between local participating economic development corporations formed under the Economic Development Corporations Act, 1974 PA 338, MCL 125.1601 to 125.1636, and the Michigan Strategic Fund, a state agency.

The MEDC's interest in this case arises from the fact that it administers most of the economic development programs of the State of Michigan, including certain programs involving tax credits, and is the principal governmental agency in Michigan for promoting economic development. Because the State of Michigan resides within the Sixth Circuit, the court of appeals' decision in this matter would serve as binding precedent in federal courts in Michigan, and therefore may affect Michigan laws involving economic development matters.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel, has a made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of this Court.

## SUMMARY OF ARGUMENT

The MEDC urges the Court to grant Petitioners' DaimlerChrysler Corporation and State of Ohio (the "Petitioners") Petitions for a Writ of Certiorari and asserts that the decision of the Sixth Circuit in this matter requires immediate review for the following reasons:

1. It is not supported by the case law which it cites as its supporting precedent; to the contrary, this decision is in fact unprecedented and is counter to prior well established precedents.

2. The decision is internally inconsistent and contradictory because it upholds a property exemption on the basis that it is "related to the use or location of the property itself," yet invalidates the Ohio investment tax credit, which also meets this criteria.

3. The decision is inconsistent with prior U.S. Supreme Court and other higher court opinions, upholding Michigan tax laws that include similar, though not identical, tax credits or deductions as being valid under the U.S. Commerce Clause.

## INTRODUCTION

The Michigan Economic Development Corporation ("MEDC") supports the Petitioners' Petitions for a Writ of Certiorari. The MEDC files this Amicus Curiae brief because of its apprehension that the Sixth Circuit has embarked on a radical departure from well settled precedents interpreting the "Dormant" Commerce Clause doctrine as it applies to state tax law. As previously acknowledged by the Plaintiffs, they propose a "novel legal theory." The MEDC strongly believes

that the Sixth Circuit's acceptance (at least in part) of this "novel legal theory" contradicts many well established precedents, and must be reviewed and reversed, immediately.

## ARGUMENT

This matter arises from the Sixth Circuit's decision filed on September 2, 2004, and amended on October 19, 2004 where it invalidated an Ohio investment tax credit ("Ohio ITC") as violative of the Dormant Commerce Clause. The Ohio ITC grants a credit against that state's corporate franchise tax for "purchases of new machinery and equipment... provided..[it is] installed in [Ohio]." Ohio Rev. Code §5733.33(B)(1).

The Sixth Circuit in this case concluded that the Ohio ITC discriminates against interstate commerce by "coercing" businesses already subject to its state franchise tax to expand locally rather than out of state. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004). Furthermore, the Sixth Circuit stated:

> Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

*Id.* at 743. The Sixth Circuit then concluded that the Ohio ITC violated the third prong of the *Complete Auto Transit*[2] test (i.e., that a tax must not discriminate against interstate commerce). This conclusion is flawed and warrants immediate review for several reasons.

## I. The Cases Cited By The Sixth Circuit Do Not Support Its Conclusion.

This case involves a tax incentive promoting purely in-state activity. The reasoning in the three cases cited by the Sixth Circuit are contrary to its conclusion. In *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318 (1997), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984), this Court addressed legal and factual issues differing significantly from this case. Each of these decisions addressed situations where states essentially imposed a higher tax on some out-of-state good or service which had the effect of giving preferential treatment to in-state businesses; none of these situations, however, involved a tax credit aimed at creating an incentive for in-state capital investment. In all three of the cited decisions (*Boston Stock Exchange, Westinghouse, and Maryland)* this Court struck down tax laws that encouraged the development of local industry by imposing higher transactional taxes on economic activities occurring outside of the state than were imposed on similar in-state activities. The net effect was a tax on the sale of products or services in another state that was higher than on

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[2] *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977)

comparable in-state sales. This is clearly discriminatory.[3] The crucial distinction between the cases cited in the Sixth Circuit's decision and this case is that the Ohio ITC does not tax any out-of-state sales. The Ohio ITC is a one-time "optional" tax incentive that promotes only in-state/intrastate investment. Sales of products or services are not taxed in any way. The Ohio ITC does not give a competitive advantage to in-state taxpayers like the statutes invalidated in *Boston Stock Exchange, Maryland* and *Westinghouse*. In fact, the tax credit appears to be equally available to both in-state and out-of-state businesses.

The Ohio ITC does not constitute the type of discriminatory tax scheme typically held to violate the Dormant Commerce Clause doctrine. The typical application of this doctrine in the context of state tax law is to invalidate discriminatory tax schemes that unduly burden interstate commerce and give a competitive advantage to in-state taxpayers, and disadvantage out of state taxpayers. However, the Ohio ITC does not do this.

The Ohio ITC applies solely to in-state activity. This is exactly the type of tax incentive that has been consistently ruled valid by courts interpreting the dormant commerce clause doctrine. The decision of the lower court must be reconsidered for these reasons.

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[3] The Petition for a Writ of Certiorari of DaimlerChrysler Corporation, at pp. 19 – 21, succinctly spells out the distinction; therefore, we rely upon that argument, and will not reiterate it here.

## II. The Sixth Circuit's Reasoning Is Internally Inconsistent And Contradictory

The Sixth Circuit upheld the validity of the personal property tax exemption that was challenged in this case. What is curious about this aspect of the opinion is that the rationale used to uphold the property tax exemption actually supports upholding the validity of the Ohio ITC, as well:

> Although conditions imposed on property tax exemptions may independently violate the commerce clause, conditional exemptions raise no constitutional issues, when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself. Stated differently, an exemption may be discriminatory if it requires a beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence. *Cf. Maryland, 451 US at 756-57* However, if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible." (emphasis added). *Cuno,* 386 F.3d at 746-47.[4]

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[4] The Sixth Circuit, while citing no direct judicial authority in support for its determination of the validity of Ohio's personal property tax exemption, looked to *Maryland v Louisiana, infra,* as showing an example of state action that was unconstitutional. As the Court is undoubtedly aware, there is a substantial academic debate ongoing as to the validity of tax incentives on Dormant Commerce Clause grounds. One such article is authored by Professors Hellerstein and Coenen, entitled "Commerce Clause Restraints On State Business Development Incentives," 81 Cornell L. Rev. 789 (1996). This portion of the Sixth Circuit's decision is significant because it appears to adopt the one exception to what

In this case, the Ohio ITC invalidated by the Sixth Circuit is obviously a tax that is "related to the use or location" of the property itself. Though limited to businesses with a specified economic presence within the state, it does not discriminate against "out-of-state" businesses. Thus, the logic the court of appeals used to uphold the property tax exemption appears to support upholding the validity of the Ohio ITC, as well.

Furthermore, the Sixth Circuit admits that a similar subsidy for economic development purposes would pass constitutional muster. The purpose of the Dormant Commerce Clause doctrine is not to exalt form over substance. Rather, its purpose is to strike down substantial and unjustified burdens on interstate commerce, and tax laws that either facially or in actuality give preferred treatment to specified local interest. The Ohio ITC does neither.

## III. Unless Overturned, The Sixth Circuit's Decision is Potentially Disruptive to Economic Development Activity in the State of Michigan.

Two prior court opinions, one by this Court in 1991, the other by the Michigan Supreme Court in 1992 (for which certiorari was denied), addressed the validity of Michigan's taxing scheme and a similar investment tax credit statute in the face of a challenge on commerce clause grounds. If not

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Professors Hellerstein and Coenen termed as their "in-state favoritism/state-coercion" approach: the Commerce Clause is not offended where a state invites a taxpayer or potential taxpayer to invest so long as the tax burden is not increased for that taxpayer should the invitation be declined. *Id.* at p.806 - 7.

reviewed, the holding in this case may call into question the continuing validity of those decisions.

In *Trinova Corporation v. the Department of Treasury*, 498 U.S. 358 (1991), this Court addressed a challenge to Michigan's Single Business Tax ("SBT"). The plaintiff in that case alleged that the Michigan SBT discriminated against out-of-state businesses in violation of the commerce clause. This Court flatly rejected this assertion. Subsequently, the Michigan Supreme Court rejected a challenge on commerce clause grounds to the validity of the capital acquisition deduction ("CAD") of the SBT, which is available only for capital investments related to Michigan business activities. See *Caterpillar, Inc. v. Department of Treasury*, 440 Mich 400, 488 NW2d. 182 (1992); *cert. den.* 506 U.S. 1014 (1992). Therefore, since 1992 this tax preference for capital investment in Michigan stood as established law, with the apparent blessing of this Court, and has been relied upon by thousands of businesses.

While there are many features of the Michigan SBT CAD and other Michigan tax incentives that are distinguishable from the Ohio ITC invalidated in this case, the Sixth Circuit's decision raises great concern that it intends to embark on an unprecedented change in commerce clause jurisprudence. It appears that the Sixth Circuit is making a significant departure from prior established commerce clause principles by adopting what the Plaintiffs themselves, as well as contemporary academic literature, acknowledge is novel legal theory not directly supported by existing precedents. To provide a measure of certainty, MEDC respectfully urges this Court to review the Sixth Circuit's decision in this matter.

However, perhaps the most unsettling aspect of the court of appeals' decision is the chilling effect it is likely to have on economic development in Michigan.

Uncertainty is perhaps the biggest obstacle to the success of any economic development initiative. If the holding of the decision below is not reversed or modified significantly, it will create uncertainty as to the validity of various Michigan economic development incentives. This will undoubtedly have a negative impact on Michigan's ability to compete with other states, and on an international level. The potential impact on the programs the MEDC administers is extraordinary. Over the past nine years, the State of Michigan has awarded incentive tax credits to 220 business expansion and retention projects which are expected to generate over $11 billion in capital investment and result in the direct creation of 56,100 jobs through the year 2025. Using REMI Policy Insight, a nationally recognized econometric forecasting and policy analysis model, the State of Michigan has projected the creation of 62,301 additional indirect jobs. Total personal income generated as a result of the new jobs will be $82.7 billion, and state revenues are projected to increase $5.4 billion, net of the cost of the credits. Based on actual experience to date with the 65 projects on which credits have been collected, 13,443 direct jobs have been created paying average annual wages of $37,149.

## CONCLUSION

For the foregoing reasons, the MEDC respectfully requests that this Court grant the Petitions for a Writ of Certiorari filed by DaimlerChrysler Corporation and the State of Ohio.

Respectfully submitted.

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# In The Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF *AMICUS CURIAE* OF THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF PETITIONER DAIMLERCHRYSLER CORPORATION

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## INTEREST OF *AMICUS CURIAE*

The Michigan Manufacturers Association ("MMA") is a business association composed of more than 3,000 Michigan businesses. An important aspect of MMA's activities is representing the interests of its member-companies in matters of paramount importance before state and federal courts, the United States Congress, the Michigan legislature, and state agencies.[1] MMA appears before this Court as a representative of business concerns employing over 90% of the industrial workforce in Michigan.

Resolution of the issues presented by this case will have profound and far-reaching implications for MMA's members and for the economy of the State of Michigan. As will be demonstrated, Michigan's employment base has suffered substantial erosion in the past decade, particularly in the manufacturing sector. Many manufacturing jobs formerly performed within the state have disappeared, not only to other states but also overseas. Michigan and its neighbor states within the Sixth Circuit are in the midst of an intense struggle to maintain the manufacturing base that has provided the life blood of the region's economy for generations. The decision of the panel of the United States Court of Appeals for the Sixth Circuit[2] below threatens to deprive these states of an important tool in that struggle – the use of tax incentives to encourage capital investments that create jobs for their citizens.

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[1] No person or entity, other than MMA and its members, made a monetary contribution to the preparation or submission of this brief.

[2] *Cuno, et al. v. DaimlerChrysler, Inc., et al.*, 386 F.3d 738 (6th Cir. 2004).

Accordingly, MMA respectfully but strongly urges this Court to grant *certiorari* in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents a high-speed collision at the intersection of constitutional theory and economic reality. The opinion of the panel below is based on a constitutional theory that holds that Ohio, by offering taxpayers a tax-based incentive to invest within the state, necessarily "foreclose[es]" those taxpayers from making "tax-neutral decisions," and in substance "coerces" them into making such investments in Ohio rather than in some other state.[3] While citing precedent of this Court in support of its holding, the panel relies primarily on a law review article[4] for its "coercion" rationale, which finds no support in this Court's decisions.

More fundamentally, however, this case springs from a second, uncited law review article,[5] the premise of which is that, in using tax incentives as a tool to encourage investments, the states are engaged in a spiral of mutual destruction that is alleged to be largely unnecessary because

[3] 386 F.3d at 744, 746 at fn. 1.

[4] Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (1996).

[5] Plaintiffs' co-counsel, Professor Peter Enrich of Northeastern University School of Law, is the principal architect of this case, and his law review article, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996), is his blueprint.

it is in essence a zero-sum game. According to this theory, if all states would merely stop offering such incentives (or if they can be judicially prohibited from doing so), millions of dollars of tax revenues sacrificed to such incentives would automatically be restored to the treasuries of the various states.

The economic reality faced by the states is far different. The several states necessarily are not engaged in a zero-sum contest because there are players in the game other than themselves. In a global economy, it is naïve to assume that investment capital that potentially can be deployed in the United States will actually be spent here, and worse than naïve to base legal policy on that assumption. If the opinion below is allowed to stand, and if it is followed by the courts of other circuits, it will deal a potentially fatal blow to the efforts of all the states to retain employment that threatens to flee overseas.

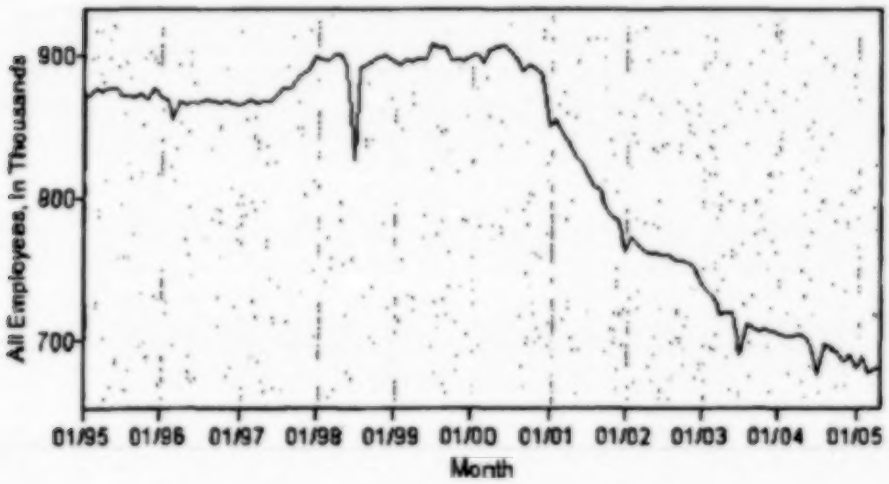
This is in all events a constitutionally unnecessary outcome. The incentives offered by Ohio that are the subject of this case, like similar incentives made available under Michigan law, are a far cry from the types of economic protectionism this Court has struck down in the past under the dormant Commerce Clause. *Certiorari* should therefore be granted in this case in order to clarify the differences between this case and the earlier decisions of this Court relied upon by the panel below. Alternatively, because the Plaintiffs in this case lack standing to complain of the allegedly discriminatory effect of the state statute at issue, this case should be remanded to the panel below with instructions to dismiss it.

## ARGUMENT

### I. TAX INCENTIVES FOR INVESTMENT COMPRISE A CONSTITUTIONALLY APPROPRIATE RESPONSE TO THE THREAT OF JOB LOSS

#### A. Michigan's Use of Tax Incentives Responds to a Real-World Problem.

Manufacturing employment in Michigan is in a state of crisis. Between March, 2000 and March, 2005, Michigan lost 231,000 jobs, of which over 217,000 were in the manufacturing sector.[6] A graph from the U.S. Bureau of Labor Statistics, reproduced below,[7] of manufacturing employment in Michigan over the last decade describes the trajectory of a ball rolling off a table:




[6] U.S. Department of Labor, Bureau of Labor Statistics, State and Area Employment, Hours, and Earnings, Michigan, Manufacturing, 1995-2005 (attached as App. 1); "Jobs Picture in Michigan Gets Bleaker," Detroit News, August 18, 2004, p. 1A.

[7] The source of the graph is the United States Department of Labor. *See* App. 1.

Economists differ on the causes of these job losses, but surely some of them result from the flight of manufacturing investment to foreign countries,[8] not simply to other states. Indeed, foreign countries have become increasingly aggressive in pursuing investments in manufacturing capability that might otherwise have been located in Michigan.[9]

To defend its employment base, Michigan (like most states) has deployed an arsenal of economic weapons designed to encourage existing and potential employers to make investments that create or maintain jobs in this state. For example, Michigan offers a series of credits against its Single Business Tax (SBT), known as MEGA (Michigan Economic Growth Authority) grants, that are conditioned on the magnitude of investment in productive capacity and/or addition or maintenance of specified levels of employment.[10] Michigan has created Renaissance Zones that enable participating businesses to obtain SBT credits for investments made there and that exempt those businesses, as well as residents of the zone, from taxes of most kinds on income earned there.[11] It offers an investment tax

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[8] "Bowling Ball Plant Moving to Mexico," Chicago Tribune, June 17, 2005, p. C1 (describing transfer of Brunswick Corp. bowling ball manufacturing from Muskegon, Michigan to Mexico, at a cost of 115 jobs); "Mich Workers of Electrolux OK Severance," Detroit Free Press, December 20, 2004 (Greenville, Michigan, employees accept severance plan after transfer of production to Juarez, Mexico and Anderson, S.C.; 2,700 employees laid off).

[9] "India Wants to Lure U.S. Auto Supply Jobs," Detroit News, December 5, 2004, p. 1A; "This Year, Ontario May Pass Michigan in Making Vehicles," New York Times, November 27, 2004, p. C1.

[10] MICH. COMP. LAWS ANN. §§ 208.37c, 208.37d, 208.37f, 208.38g.

[11] MICH. COMP. LAWS ANN. § 125.2686.

credit (similar to the Ohio credit at issue in this case) against the SBT for investments in business property within the state.[12] Michigan also makes available partial or complete exemption from property tax for investments in productive property of specific types or located within specific financially distressed areas.[13] In each case, Michigan's legislature, on behalf of its citizenry, has determined that these incentives are both necessary and effective in attracting and keeping investment in jobs-producing industries for the ultimate benefit of the state as a whole.

### B. Tax Incentives Have Been Effective in Creating or Maintaining Employment in Michigan.

How much worse Michigan's employment situation might now be without these incentives is difficult to ascertain; however, based on newspaper accounts published within the past year, the availability of such incentives has been a significant factor in keeping or adding jobs in Michigan. For example:

- Dawn Food Products chose to locate its headquarters in Leoni Township, near Jackson, Michigan, with the prospect of creating 400 jobs over the next 15 years. Dawn received a MEGA credit against the Single Business Tax worth approximately $1.9 million over 15 years, and a 50 percent abatement of property tax worth approximately $529,200.[14]

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[12] MICH. COMP. LAWS ANN. § 208.35a.

[13] MICH. COMP. LAWS ANN. §§ 207.551 through 207.572; MICH. COMP. LAWS ANN. § 211.9f.

[14] "Dawn Food Products Locates World Headquarters in Jackson, Mich," South Bend Tribune, July 5, 2004, p. 2.

- Responding to the creation of a Renaissance Zone, real and personal property tax abatements worth more than $2.5 million, and a MEGA Single Business Tax credit worth some $3.7 million, Kellogg Company brought more than 300 new jobs to its headquarters in Battle Creek.[15]

- Lacks Enterprises, Inc. invested $51.8 million to expand and develop new facilities in Kent County, creating 242 new jobs directly and 392 indirectly. Lacks received a MEGA SBT credit of approximately $2.5 million and a $4.3 million abatement of real and personal property taxes.[16]

- Karmann USA, a subsidiary of a German company, agreed to build a $15 million facility in Plymouth Township that will employ 250 people. Karmann received property tax abatements plus a MEGA SBT credit of approximately $2.9 million.[17]

- Musashi Auto Parts – Michigan, Inc. committed to expand its Battle Creek facility, adding 178 new jobs. The company received a $1.4 million MEGA SBT credit and $2.5 million in property tax abatements.[18]

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[15] "Commission OKs Tax Items for Kellogg," Battle Creek Enquirer, July 7, 2004, p. 3A.

[16] "Lacks' $51.8M Expansion Stays in West Michigan," Grand Rapids Business Journal, July 19, 2004, p. 6.

[17] "Karmann Begins its First U.S. Plant," Detroit News, September 29, 2004, p. 2B.

[18] "Musashi to Expand," Detroit Free Press, October 21, 2004.

- Ford Motor Company invested $300 million to expand its Wayne, Michigan Truck Assembly plant, preserving 3,500 jobs. Ford was granted a MEGA SBT credit worth $50 million over 20 years, and received property tax abatements of an additional $40 million over 12 years.[19]

- Federal-Mogul Corp. decided against moving 790 jobs to Mexico, choosing instead to keep open its plants in Greenville, St. Johns, and Sparta. A critical factor in the company's decision was a $65 million MEGA SBT credit over 20 years.[20]

- General Motors agreed to a $450 million expansion and refurbishment of two of its Flint facilities in exchange for $28 million in MEGA SBT credits. The projects will result in the creation of 300 jobs at a plant that currently employs 3,350.[21]

- Guardian Industries Corp. announced a $25 million expansion of its Albion plant, bringing 135 to 150 new jobs to the area. Guardian received a MEGA SBT credit of approximately $1.6 million and property tax abatements worth about $4 million over 12 years.[22]

- Faurecia North America, a subsidiary of a French company, agreed to build a $40 million

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[19] "Wayne Plant Retooling Saves 3,500 Ford Jobs," Detroit News, December 15, 2004, p. 1A.

[20] "790 Federal-Mogul Jobs Saved," Detroit Free Press, December 15, 2004.

[21] "GM to Invest $450 Million in Flint Plants," Detroit Free Press, December 17, 2004.

[22] "Guardian to Bring New Jobs to Albion," Battle Creek Enquirer, January 14, 2005, p. 1A.

manufacturing plant in Sterling Heights, expected to create 448 jobs. It was induced to do so by a $6.3 million MEGA SBT credit and $4.2 million in property tax abatements.[23]

- Chrysler Corporation committed to a $506.8 million renovation of two factories in Sterling Heights, preserving more than 5,000 jobs. Chrysler was awarded an $18.8 million MEGA SBT credit, and received $17.8 million in property tax abatements.[24]

- Toyota Motor Corp. announced plans to invest $150 million to expand its technical facilities in York Township, near Ann Arbor, creating 400 jobs. Tax credits totaling $38.9 million over 20 years were a deciding factor.[25]

- After having moved its sun visor manufacturing operation from Holland, Michigan, to Mexico, at a cost of 900 jobs, Johnson Controls, Inc. decided to invest $118 million in another plant in Holland and one in Battle Creek, preserving 747 jobs and adding 525 new ones. The decision was attributed to the availability of $17.4 million in MEGA SBT credits and $10.2 million in property tax abatements.[26]

- Duncan Aviation chose to invest $19.5 million to expand its Battle Creek facility, resulting in

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[23] "French Supplier Faurecia Plans $40M Plant, Wins Tax Break," Crain's Detroit Business, March 21, 2005, p. 24.

[24] "Chrysler Saves 5,000 Metro Jobs," Detroit News, March 22, 2005, p. 1A.

[25] "Toyota to Invest $150 Million in Michigan," Detroit News, April 13, 2005, p. 1B.

[26] "JCI Nixes Move Plan," Grand Rapids Business Journal, April 25, 2005, p. 6.

380 new jobs. Duncan received a MEGA SBT credit of $2.2 million, and the City of Battle Creek contributed infrastructure improvements worth $1.3 million.[27]

- Severstal NA, a subsidiary of a Russian steel company, agreed to invest up to $250 million in upgrades to its Dearborn mill, preserving 2,000 jobs. The state agreed to grant Severstal a $28.7 million MEGA SBT credit, and property tax abatements on the new property are expected to total an additional $19 million.[28]

### C. State Tax Credits and Exemptions for Investment Do Not "Foreclose Tax-Neutral Decisions."

The common feature of these incentives and allowances is that they are unmistakably, prosaically *local* in nature. Credits against the Michigan SBT are granted for creating Michigan jobs or placing plant and equipment in Michigan. Exemptions from and abatements of property taxes, while authorized by state law, are adopted and take effect at the municipal level. In every case, if no investment is made, no Michigan tax advantage is gained. If the investment is made elsewhere, no Michigan consequences are felt. The impact of these measures on interstate commerce is ephemeral, if not entirely illusory.

The decision of the panel below rests primarily on three of this Court's decisions: *Boston Stock Exchange v.*

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[27] "Duncan to Expand, Will Bring 380 Jobs to B.C.," Battle Creek Enquirer, May 18, 2005, p. 1A.

[28] "Severstal Gets Tax Break to Upgrade," Detroit Free Press, June 22, 2005.

*State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); and *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984). Like this case, each of these cases involved a credit offsetting a tax levied by the taxing jurisdiction. In each of these cases, however, unlike the present case, the end result of the application or withholding of the credit was the levying by the taxing jurisdiction of a higher tax, or a higher rate of tax, against business operations carried on by the taxpayer in another state. Hence the adjuration in *Boston Stock Exchange*, repeated in one form or another in subsequent cases, against a state's discriminatory taxation of "business operations performed *in any other state*," 429 U.S. at 337 (emphasis supplied).

No similar imposition is presented here. The Ohio investment tax credit is not concerned in the slightest with the taxpayer's activities "in any other state." It asks only what the taxpayer has invested in Ohio, and rewards the taxpayer accordingly. It does not punish, as did the tax schemes in *Boston Stock Exchange* and *Westinghouse*, activities in any other state, unless one adopts the remarkable and radical view that the absence of a reward is a punishment.

In the ultimate analysis, this Court's language in *Boston Stock Exchange* and its progeny forbidding state tax provisions that "foreclose tax-neutral decisions" will simply not bear the weight that the Plaintiffs in this case, and the panel below, seek to place on it. Under our federal system, state tax provisions are bound to vary enormously.

Some states tax businesses; other do not.[29] Some states impose property tax on all tangible business property; some exempt personal property;[30] most exempt inventory.

In point of fact, a truly "tax-neutral decision" on whether to do business in one state or another is a practical impossibility. In analyzing the Ohio credit under the Commerce Clause, therefore, the focus instead should be on whether the credit is a "taxing measure[] that imposes greater burdens on economic activities taking place outside the State than [are] placed on similar activities within the State," *Westinghouse Electric Corp v. Tully*, 466 U.S. at 404. Judged by this standard, an incentive for in-state activity like Ohio's investment tax credit passes constitutional muster.

### D. The Formulation of the Holding Below Is Logically Unsound.

The panel below accepts Plaintiffs' assertion that "the economic effect of the Ohio investment tax credit is to encourage *further* investment in-state at the expense of development *in other states* . . . ," 386 F.3d at 745 (emphasis supplied). This statement contains two propositions that do not bear close logical scrutiny.

One is that an investment in Ohio is inevitably made "at the expense of development in other states." This is unprovable and unknowable. The Court assumes that the

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[29] Nevada, South Dakota, and Texas do not impose a corporate income tax.

[30] Delaware, Hawaii, Illinois, New Hampshire, New York, and Pennsylvania do not tax personal property. *See, e.g.*, N.Y. REAL PROP. TAX LAW § 300.

taxpayer would in every case make the identical investment in productive capacity *somewhere*, and is compelled to make it in Ohio rather than in some other state as a result of the "coercive" effect of the Ohio investment credit.[31] As a factual matter, there is nothing in the opinions of either the Court of Appeals or the District Court in the present case to support that assumption. That the taxpayer may have been induced in part by the availability of the credit into entering into an agreement with the City of Toledo to make the investment does not suggest – much less require – that the same taxpayer was equally prepared to make the investment elsewhere had it not been "coerced" by the credit into making it in Ohio.

The other dubious proposition underlying the holding below is its application solely to "further" investment. In other words, the panel appears to hold that only a taxpayer having existing taxable business activity in Ohio, and an existing tax bill capable of reduction, can be "coerced" by the availability of the credit.[32] By the same reasoning, a functionally identical taxpayer having no previous business activity within the state suffers no similar coercion, even if following its investment it earns an identical credit against its future Ohio taxes.

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[31] The panel's "coercion" rationale, if allowed to stand, bids fair to become yet another item in the legal "wardrobe of ever-changing negative Commerce Clause fashions," *American Trucking Association, Inc. v. Michigan Public Service Commission*, ___ U.S. ___, 125 S. Ct. 2419, 2426 (2005) (Scalia, J., concurring).

[32] The panel's intellectually indefensible distinction between a tax credit and a property tax exemption as a constitutionally permissible incentive appears to turn on this very factor.

On these facts, it appears that the Ohio investment tax credit can at best be said to be only situationally unconstitutional, a curious status indeed. This Court has said that it "need not know how unequal the Tax is before concluding that it unconstitutionally discriminates," *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981). It has also said that "[v]arying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field," *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 276-77 (1988). So far as can be determined, however, this Court has never held state tax legislation unconstitutional under the dormant Commerce Clause where the allegedly discriminatory impact of the legislation depended entirely upon the prior level of economic activity within the state of the party allegedly discriminated against.

## II. THE PLAINTIFFS IN THIS CASE HAVE SUFFERED NO COGNIZABLE INJURY THAT IS REDRESSED BY THE DECISION BELOW

Precious little is said in the District Court's opinion, and nothing whatever in the opinion of the Court of Appeals, about the Plaintiffs in this case. Their own petition for *certiorari*, Docket No. 04-1407, states that "most" of them "are residents of the City of Toledo or small businesses located there" and that "[m]any of them were displaced from their former homes or places of business by

the City in order to assemble the site for [DaimlerChrysler's] Jeep plant,"[33] Petition of Plaintiffs for *Certiorari*, 4. Plaintiffs' Petition further states that "these plaintiffs pay taxes to and receive the benefit of services from the City of Toledo, the affected school districts, and the State of Ohio, and are injured by the City's school districts', and State's loss of tax revenues due to the challenged tax incentives." Petition at 5.

These Plaintiffs are in no way injured by the Ohio franchise tax credit that the Court of Appeals held below to be constitutionally infirm. They are not discriminated against by operation of the credit, and have not alleged that they pay taxes at a higher rate or in a demonstrably greater amount whether DaimlerChrysler invests in Ohio, elsewhere, or not at all. Indeed, it is not made to appear anywhere in the available record of this case whether any of the Plaintiffs pay any Ohio franchise tax at all. Moreover, those Plaintiffs that are residents of the City of Toledo are if anything *benefited* by the increased level of employment and economic activity resulting from DaimlerChrysler's substantial investment in plant and equipment there.

As previously noted, this case is in essence the actualization of a legal theory put forth in a law review article. Historically, this Court has declined to render decisions on the basis of interesting legal theories, but rather has required that the parties that bring a case here have "such a personal stake in the outcome of the controversy as to

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[33] The alleged displacement of any of the Plaintiffs is of course irrelevant to the issue of whether the Ohio investment tax credit discriminates against interstate commerce.

assure that concrete adverseness which sharpens the presentation of questions which the court so largely depends for illumination of difficult constitutional issues," *Flast v. Cohen*, 392 U.S. 83, 99 (1968), citing *Baker v. Carr*, 369 U.S. 186, 204 (1962). This requirement of standing "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

This Court has summarized the elements of the standing requirement as follows: "A plaintiff must allege personal injury [the injury element] fairly traceable to the defendant's allegedly unlawful conduct [the causation element] and likely to be redressed by the requested relief [the redressibility element]," *Allen v. Wright*, 468 U.S. 737, 751 (1984). In the context of lawsuits brought by taxpayers, the injury and causation elements have uniformly taken the form of a challenge to a governmental expenditure – what this Court has described as "a good-faith pocket-book action," *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). There is no such expenditure in the present case, unless one indulges the fiction that any failure by a state to collect the maximum amount of tax theoretically extractable from all persons within its tax grasp is a "tax expenditure." The Plaintiffs in this case, as taxpayers, have suffered no injury caused by any of the Defendants.

Even granting credibility to the dubious "tax expenditure" rationale, a finding that the Ohio investment tax credit discriminates impermissibly against interstate

commerce does nothing to remedy any injury the Plaintiffs could be perceived to have suffered. With or without the credit, there can be no assurance that tax revenues will increase, or that taxpayers such as DaimlerChrysler will engage in business activities in Ohio at the same level, or at all. What this Court said in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), therefore resonates here:

> [I]t is pure speculation whether [this] lawsuit would result in any tax relief for respondents. If they were to prevail, it is conceivable that more money might be devoted to education; but since education in Arizona is not financed solely from the school trust fund . . . , the State might reduce its supplement from the general funds to provide for other programs. The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain . . . " 490 U.S. at 614.

It is unclear what the Plaintiffs in this case actually want, beyond vindication of the legal theory of their counsel, but to the extent it involves any financial interest whatever, the possibility of recovery of that interest by this lawsuit is likewise "remote, fluctuating, and uncertain."

It is evident that these Plaintiffs entirely lack the personal financial stake in the outcome of this case that this Court has traditionally demanded of litigants appearing before it. The relief sought and obtained from the panel below confers no discernible benefit on them while harming all of the Defendants as well as the citizens of Ohio. What the Plaintiffs have done, ultimately, is to instigate a controversy in which they are not significantly involved. This is an inherently suspect route into this Court:

> When . . . , as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed [to establish standing.] [W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (emphasis in original).

## CONCLUSION

MMA strongly urges this Court to grant *certiorari* in this case and, ultimately, to reverse the decision below. If it does not do so, however, this Court should at minimum remand this case to the panel below with instructions to dismiss it for lack of standing on the part of Plaintiffs.

Respectfully submitted,

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## State and Area Employment, Hours, and Earnings

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Area: Statewide
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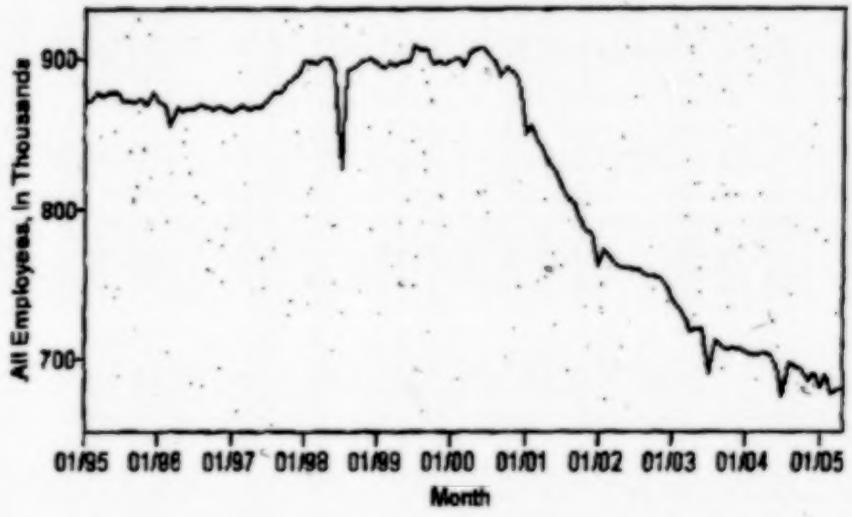


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| 1999 | 894.8 | 892.9 | 896.8 | 894.3 | 896.2 | 897.1 | 908.2 | 905.2 | 904.5 | 895.0 | 896.5 | 895.8 | |
| 2000 | 898.7 | 898.9 | 894.1 | 903.8 | 904.8 | 905.7 | 901.5 | 896.4 | 887.4 | 893.1 | 889.3 | 885.0 | |
| 2001 | 849.4 | 854.8 | 846.3 | 839.0 | 830.8 | 824.9 | 814.1 | 808.1 | 804.9 | 793.3 | 785.6 | 783.3 | |
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| 2004 | 705.0 | 702.5 | 702.5 | 704.2 | 702.2 | 695.6 | 676.3 | 696.9 | 695.7 | 693.4 | 685.3 | 690.4 | |
| 2005 | 680.9 | 689.2 | 676.9 | 680.3 | 681.8(p) | | | | | | | | |

p : Preliminary

App. 1

SUPREME COURT, U.S.
FILED
JUL 20 2005
OFFICE OF THE CLERK

No. 04-1704

# In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
*Petitioners*,

v.

CHARLOTTE CUNO, ET AL.,
*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICUS CURIAE* NISSAN NORTH AMERICA, INC., IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

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## INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief in support of the petition of DaimlerChrysler is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for petitioners and respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The State of Ohio, like virtually all States, offers both in-state and out-of-state businesses tax benefits and related incentives to foster local economic development and create jobs. In particular, Ohio has enacted an investment tax credit ("ITC") that grants a non-refundable credit against the State's corporate franchise tax to any taxpayer that "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by a particular date. Ohio Rev. Code § 5733.33(B)(1). Since 1995, corporations, including petitioner DaimlerChrysler Corporation, relying on that provision have invested more than $30 billion in Ohio plants and equipment. Pet. 4. The Sixth Circuit below held that this Court's decisions compel the conclusion that the Ohio ITC violates the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3.

*Amicus* Nissan North America, Inc. ("Nissan") has a direct and substantial interest in this case. Nissan is a global automobile company headquartered in Japan with major operations in North America, including operations within the Sixth Circuit. Nissan's plant in Smyrna, Tennessee, covers

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or part and that no entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

5.2 million square feet and is one of the largest automobile production plants under one roof in the United States. Nissan manufactures more than 500,000 vehicles at the Smyrna plant each year, including its Xterra and Pathfinder SUVs, Frontier pickups, Maxima sports sedans, and Altima mid-size sedans. As explained below, Nissan's Smyrna plant and a second manufacturing facility in Decherd, Tennessee, have resulted in the investment by Nissan of billions of dollars in infrastructure and equipment in Tennessee as well as the creation of more than 10,000 high-wage paying jobs.

Nissan receives tax incentives from the State of Tennessee based, in part, on the extent of business that it does in Tennessee and the workers it employs. These incentives are part of a coordinated effort by the State to encourage the investment by high-wage industries in new plants and equipment in Tennessee. Not only is that effort hugely popular, it has produced enormous economic dividends for the State. Although the Tennessee incentive scheme differs from the Ohio ITC invalidated by the Sixth Circuit, the Sixth Circuit's decision nonetheless creates uncertainty for businesses such as Nissan that are considering investing in new facilities in Tennessee or other States.

As a major multi-national corporation with global sales, Nissan may consider investing not only in States and communities outside of the Sixth Circuit, but in other countries that may offer more favorable and reliable tax and economic incentives. Foreign competition for manufacturing jobs has become increasingly intense. The plaintiffs' (respondents in this Court) effort to "level the playing field" among the fifty States ignores the reality that the playing field is global, not national, and their attempt to level the field can only result in tilting it in favor of other countries. The decision in this case jeopardizes the ability of the United

States to compete for foreign investment by offering tax incentives that are barred according to the Sixth Circuit's reading of this Court's precedents.

If allowed to stand, the Sixth Circuit's decision will unavoidably affect Nissan's decisions regarding the location of and investment in its manufacturing facilities in the future. Accordingly, Nissan has a strong interest in ensuring that this Court reviews the Sixth Circuit's decision invalidating the Ohio ITC.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case meets several independent criteria for certiorari. *See* S. Ct. Rule 10. First, the case undeniabiy presents an issue of extraordinary importance. The Sixth Circuit's decision declares unconstitutional an Ohio law tbat grants tax credits to businesses that invest in local infrastructure in a manner that is in no way dependent on a company's out-of-state activities. Every State in the Union offers economic incentives such as tax credits to promote in-state investment and economic growth. *See* Walter Hellerstein & Dan T. Coenan, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996).

These provisions have resulted in the investment of billions of dollars in Tennessee and other States by both U.S. companies and the North American divisions of foreign companies such as Nissan. The decision below creates economic uncertainty about the availability of these tax incentives and therefore may have the unintended consequence of diverting billions of dollars of investment, not to mention thousands of manufacturing jobs, to other countries.

Second, the Sixth Circuit's decision is contrary to this Court's own Commerce Clause precedents. This Court has held that the "'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)). The "paradigmatic example" of such a measure is a law that "taxes goods imported from other States, but does not tax similar products produced in State." *Id.* at 193. At the same time, the Court has made clear that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," and that States are free to "compete with other States for a share of interstate commerce." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-337 (1977). Indeed, "it is undisputed that States may try to attract business by creating an environment conducive to economic activity," including "low taxes." *West Lynn Creamery*, 512 U.S. at 199 n.15 (citing cases); *see also Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("There seems to be nothing . . . that would prevent [a State] from providing subsidies or other tax breaks to domestic industries."). The Commerce Clause simply erects no prohibition—dormant or otherwise—on State laws like the Ohio ITC that create tax incentives for investment based solely on in-state activities and that are in no way dependent on a company's out-of-state activities.

Third, the Sixth Circuit's decision directly conflicts with a decision of the Michigan Supreme Court. In *Caterpillar v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), the Michigan Supreme Court held that a business tax deduction

designed to encourage capital investment in Michigan did not violate the dormant Commerce Clause. Like the Ohio ITC, the Michigan tax incentive law was designed "so that only those acquisitions that relate to Michigan business activity" are relevant to the incentives. *Id.* at 187. The Michigan Supreme Court squarely rejected the argument that the tax incentive at issue was "discriminatory because it was enacted to promote investment in Michigan" and, invoking this Court's precedents, stressed that "States are free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Id.* at 192 (quoting *Boston Stock Exchange*, 429 U.S. at 336-337). The direct conflict between the Sixth Circuit's decision in this case and the Michigan Supreme Court's decision in *Caterpillar* not only exacerbates the confusion and unpredictability that will be created by this case if the decision below is allowed to stand, but provides an independent basis to grant plenary review in this case.

## REASONS FOR GRANTING THE WRIT

### I. THE EXTRAORDINARY IMPORTANCE OF THE QUESTION PRESENTED EXTENDS FAR BEYOND THE DECISION OF THE COURT OF APPEALS, WHICH POSES A DIRECT THREAT TO STATES' EFFORTS TO SUCCEED IN THE GLOBAL COMPETITION FOR INVESTMENT AND HIGH WAGE JOBS.

#### A. As Nissan's Own Experience In Tennessee Illustrates, Tax Incentives like the Ohio ITC Are Critical In Promoting Economic Growth.

The constitutionality of tax incentives such as the Ohio ITC is a matter of exceptional national importance. All States

offer economic incentives—such as tax benefits—to promote in-state investment and economic activity. *See* Walter Hellerstein & Dan T. Coenan, *supra*, at 790. In Ohio alone, it is estimated that corporations relying on such incentives, including petitioner, have invested more than $30 billion in industrial plants and equipment. Pet. 4. This investment has transformed economically depressed areas and created thousands of high-paying jobs. But the uncertainty created by the Sixth Circuit's decision in this case as to the constitutionality of such incentives may lead companies to invest in other States—or, in the case of multi-national companies such as Nissan, other countries—and thus inflict great economic harm on American communities.

The importance of this case is underscored by Nissan's own investment experience in Tennessee. For nearly half a century, the State of Tennessee has sought to encourage the location in Tennessee of plants and equipment by high-wage industries by providing a variety of tax incentives for investments in plants and equipment located in Tennessee. *See McConnell v. City of Lebanon, Tennessee*, 203 Tenn. 498, 514-15 (1958). A centerpiece of these efforts was the State's successful negotiation in 1980 with Nissan that led Nissan to locate its first automobile manufacturing plant in the United States in Smyrna, Tennessee. The Smyrna plant is one of the largest automotive production plants under one roof in the United States. Nissan later constructed a separate plant in Decherd, Tennessee. Since 1980, Nissan has invested approximately $2.8 billion in plants and equipment in Tennessee and created some 12,000 jobs at these plants. *Nissan plans to expand Pathfinder Production Facility in Tennessee*, NEWPORT PLAIN TALK (Newport, Tennessee), June 26, 2003 (investment in Tennessee); *Nissan to Expand Decherd Powertrain Plant*; BUSINESS WIRE Friday, July 16, 2004 (number of jobs).

The effect of these industrial recruitment efforts has literally transformed Tennessee's economy. In each of the last nine years there have been between $2 billion and $4.4 billion invested in plants and equipment by all manufacturers in Tennessee. Tom Sharp, *Federal case on tax breaks could affect Tennessee*, THE TENNESSEAN (Nashville, Tennessee), September 13, 2004. Nissan's Smyrna plant, along with others, has spawned the location of more than 950 parts manufacturing plants and supplier facilities in and around Middle Tennessee, collectively estimated to employ more than "154,000 Tennesseans representing 33% of the state's manufacturing workforce and 5.7% of total state employment." *Nissan Announces 1,500 Jobs Coming to Smyrna*, THE LEWISBURG TRIBUNE (Lewisburg, Tennessee), June 26, 2004. This job multiplier effect makes the automotive industry, in particular, a highly sought-after boon for State economies. Each manufacturing job at a major automotive facility like that operated by Nissan in Smyrna spins off an additional 9.4 jobs. Institute of Labor and Industrial Relations at the University of Michigan, et al., *Contribution of the U.S. Motor Vehicle Industry to the Economies of the United States, California, New York, and New Jersey in 2003* (May 2004) (available at http:/www.cargroup.org/pdfs/ContributionStudy.pdf).

Tennessee, a comparatively low-wage state,[2] has benefitted immensely from the high-paying jobs created by Nissan's multi-billion dollar investment in its Tennessee plants. Assembly line jobs at Nissan's Smyrna and Decherd facilities provide an average annual wage in excess of $57,000—over $25,000 higher than the state average. *Nissan Expansion Good News for Regional Economy*, DAILY NEWS JOURNAL (Murfreesboro, Tennessee), July 21, 2000 (citing Tennessee Commissioner of Economic and Community Development); Bureau of Labor Statistics, *supra*. All told, Tennessee's automotive manufacturers provide jobs, with a Tennessee payroll in excess of $5.7 billion, which represent the first opportunity for thousands of Tennessee families to move solidly into the middle class.

### B. The Competition For Automotive Manufacturing Jobs Is Global And Pits Tennessee Against Mexico, Canada, And A Growing Number Of Other Nations With Sophisticated Automotive Industries.

These tax incentives are not only critical to competition for investment among the various States, but also are increasingly important in competing with other countries for investment in the global marketplace. Recent experience involving Nissan illustrates that in a global economy, particularly since the ratification of the NAFTA Treaty, States

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[2] Tennessee ranked thirtieth among the 50 States and District of Columbia for average annual pay in 2001. Bureau of Labor Statistics, *State average annual pay for 2000 and 2001*, www.bls.gov/news.release/annpay.t02.htm. By comparison, States like New York, ranked third, and California, ranked sixth, have an abundance of high-wage jobs. Each State has different employment needs and should be permitted to tailor incentive programs to meet those needs.

within the United States compete for manufacturing jobs not only among themselves, but also with foreign countries.

In 2001, for example, when Nissan decided to expand its engine plant in Decherd, Tennessee, as part of an overall Tennessee investment of more than $1 billion, it added approximately 1,000 additional high-paying Tennessee jobs to Franklin County. Bernard Bush, *Decherd to Get Nissan Metal Forge*, THE TENNESSEAN, July 17, 2004. In 2004, Nissan further expanded the Decherd facility to add a crankshaft production center. *Id.* In deciding where to place this operation, Nissan's business determination ultimately came down to a choice between expanding its facility in Decherd, Tennessee, or expanding its existing factory in Aguascalientes, Mexico, where it is currently manufacturing 250,000 Sentra automobiles annually, many of which are exported duty-free to the United States. The tax incentives offered to Nissan by Tennessee played a significant role in offsetting the very substantial wage differential between Tennessee and Mexico and thus were an important factor in Nissan's decision to invest in its Decherd, Tennessee, plant for this project. In other major Tennessee investments in the past four years, Nissan has established new production lines and expanded facilities for manufacturing its Pathfinder and Maxima vehicles in Smyrna, Tennessee. The recent Maxima and Pathfinder operations, together with the recent Decherd engine plant expansion and crankshaft production line mentioned above, added more than 2,000 new Tennessee Nissan jobs. *all transferred from existing facilities in Japan.* Wayne Thomas and Larry Nee, *Nissan Plans Forging Plant*, THE HERALD CHRONICLE (Winchester, Tennessee), July 20, 2004; John Callow, *Nissan to Add 1,500 More Jobs*, DAILY NEWS JOURNAL (Murfreesboro, Tennessee), June 26, 2003.

### C. The Sixth Circuit's Decision Creates Enormous Uncertainty In A Key Industrial Region Over The Validity Of Vital Economic Incentives.

Nissan in no way concedes that the Tennessee tax incentives on which it has relied in deciding to invest billions of dollars in manufacturing plants and equipment in Tennessee are unconstitutional, and it is prepared to contest that matter should it ever become necessary to litigate the issue. However, the mere perception of possible unconstitutionality that the court of appeals' decision has engendered and the uncertainty and hesitancy it has created in the minds of those who must decide whether to invest in Tennessee or elsewhere alone will necessarily impact Tennessee's efforts. Accordingly, by casting doubt on the constitutional validity of tax incentives, the court of appeals' decision in this case could substantially impair Tennessee's ability to attract new industry and create new jobs, not to mention the ability of the other States within the Sixth Circuit to do the same.

But Tennessee's or Ohio's potential loss will not necessarily be Alabama's or Mississippi's gain, rather it may well be Mexico's, Canada's, or some other country's gain, and Tennessee and, ultimately, the entire United States will be the losers. Moreover, to the extent that manufacturers continue to make investments within the United States, the balkanization among the States created by the court of appeals' decision—which is controlling in Michigan, Ohio, Kentucky, and Tennessee—puts those four States at a distinct disadvantage vis-a-vis the 46 other States in competing for major manufacturing investments by global companies in the United States.

While its reach and applicability to other tax incentive statutes remains unclear, the Sixth Circuit's decision raises a host of difficult issues:

- Will the reductions in tax liabilities by the application of tax credits be abolished prospectively, and if so, beginning when?

- Will the new *Cuno* rule be applied retroactively in the form of assessments of tax deficiencies based on retroactive disallowance of the tax credits, and if so, for how many years back?

- How will companies that long ago performed their part of the bargain and made investments in reliance upon the tax incentives be made whole if the incentives are declared unconstitutional?

In deciding whether to expand its existing plants in Tennessee, Nissan will have to significantly discount if not disregard the tax incentives in its analysis. The uncertainty may force Nissan to look elsewhere, perhaps to its other U.S. plant located in Mississippi—a State in a Circuit not directly under the same cloud of uncertainty—or to defer expanding further anywhere in the United States until such time as the uncertainty in the tax incentive structure has been settled.

Moreover, in the wake of the decision in this case, it is unclear whether foreign manufacturers will continue to have the same level of confidence in the stability and predictability of the tax laws of the United States. In addition to Nissan, BMW, Toyota, Honda, Hyundai, and other foreign automobile manufacturers have invested billions of dollars in plants and equipment in various States, both within and outside the Sixth Circuit. Before making billion-dollar

investments in U.S. communities in reliance upon State tax incentives, negotiators of incentive packages for foreign manufacturers will have to ask themselves whether they will later find their trust was misplaced and their reliance was based on an unfulfilled commitment. Officials of Nissan and other foreign manufacturers who have invested in the United States in good faith have reason to be concerned that these States may not be able to make good on their promises of significant long-term future tax incentives upon which they relied to make massive investments in plants and development in those States. By reversing the decision of the court of appeals, this Court can assuage those concerns and provide the answer that their confidence was not misplaced—the commitments will be kept.

This Court should grant certiorari to resolve that uncertainty by making clear that tax incentives such as the Ohio ITC are constitutional. States and local governments may debate the desirability and tradeoffs of conferring such benefits, but this Court should resolve any doubt that the Constitution leaves States and local governments free to enact such tax incentives if they see fit.

## II. THE SIXTH CIRCUIT'S DECISION IS FUNDAMENTALLY AT ODDS WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

The need for this Court's review is heightened by the fact that the Sixth Circuit's decision contravenes the basic principles established by this Court's Commerce Clause precedents. The dormant Commerce Clause was designed to prohibit "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery,*

*Inc. v. Healy*, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)). The Sixth Circuit, however, has broadly interpreted this Court's Commerce Clause decisions to prohibit State efforts to attract interstate commerce by conferring tax incentives that reward in-state economic activity but in no way penalize activity in other States. The logic of the court of appeals' decision, moreover, theoretically extends beyond tax credits to virtually any incentive—direct subsidies, better schools or roads, commitments to invest in surrounding areas—that a State might offer to attract business to its communities.

In reaching that conclusion, the Sixth Circuit relied on a trio of this Court's decisions—*Boston Stock Exchange*, *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Pet. App. 6a-9a. The State law invalidated in each of those cases, however, differs in a critical respect from the Ohio ITC at issue in this case. In *Boston Stock Exchange*, the Court held unconstitutional a State transfer tax statute that operated so that securities "transactions involving an out-of-state sale [were] . . . taxed more heavily than most transactions involving a sale within the State." 429 U.S. at 319. In *Maryland*, the Court invalidated a State "first use" tax that applied primarily to "gas moving *out of* State," and that, through the operation of credits and exclusions, was largely inapplicable to in-state users of gas. 451 U.S. at 759; *see id.* at 756-757. And, in *Westinghouse Electric*, the Court struck down a State franchise tax credit that not only rewarded increased activity in the State, but "penalize[d]" increased activity in *other* States. 466 U.S. at 401. Thus, each of these cases involved "state tax statutes that encouraged the development of local industry by means of taxing measures that imposed greater burdens on economic activities taking place outside the State than were placed on

similar activities within the State." *Id.* at 403-404. In stark contrast, as both the court of appeals and district court recognized, the Ohio ITC is in no way dependent on a company's activities outside the State and in no way penalizes such activity. *See* Pet. App. 6a; *see id.* at 29a. Its sole function is to reward economic activity *within* the State.

This Court has observed that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity," including "low taxes." *West Lynn Creamery*, 512 U.S. at 199 n.15 (citing cases). In addition, individual Justices have observed that States may offer tax incentives that benefit local industry without penalizing out-of-state businesses. *See, e.g., Chemical Waste Mgmt.*, 504 U.S. at 351 (Rehnquist, C.J., dissenting) ("There seems to be nothing . . . that would prevent [a State] from providing subsidies or other tax breaks to domestic industries."); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) (The Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a *tax credit*, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.") (emphasis added). The Sixth Circuit's decision is not only fundamentally at odds with this Court's precedents, but creates a dormant Commerce Clause that will swallow virtually any State law that seeks to encourage in-state investment simply by rewarding it. At a bare minimum, such a far-reaching and counter-intuitive result warrants careful scrutiny by this Court.

## III. THE SIXTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH A DECISION OF THE MICHIGAN SUPREME COURT.

The Sixth Circuit's decision also conflicts with a decision of a State court of last resort within that Circuit. In *Caterpillar v. Department of Treasury*, 440 Mich. 400, 488 N.W.2d 182 (Mich. 1992), the Michigan Supreme Court—relying on the same body of this Court's case law considered by the Sixth Circuit—held that a State tax deduction designed to encourage capital investment in Michigan did not violate the dormant Commerce Clause. The law at issue in *Caterpillar*—the "capital acquisition deduction" ("CAD")—provides a business tax deduction for companies making capital investments in Michigan and was designed "*so that only those acquisitions that relate to Michigan business activity are included in the CAD.*" *Id.* at 187 (emphasis added).

Caterpillar, Inc. challenged the Michigan tax deduction because it was apportioned according to a formula based only on the location of the taxpayers' property and payroll, without consideration of the taxpayer's sales. Caterpillar argued that the deduction was "discriminatory because it was enacted to promote investment in Michigan." *Id.* at 192. The Michigan Supreme Court squarely rejected that argument, invoking this Court's admonition that "States are free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Id.* at 192 (quoting *Boston Stock Exchange*, 429 U.S. at 336-337).

The Michigan high court's decision in *Caterpillar* squarely conflicts with the Sixth Circuit's decision below. The tax incentive in *Caterpillar* was directed at the same economic activity—i.e., in-state investment—rewarded by the Ohio ITC.

The constitutional challenge in *Caterpillar* turned on the same legal principle—the anti-discrimination prong of the *Complete Auto* test—that is the crux of the Sixth Circuit's decision below. In addressing that issue, both the Michigan Supreme Court in *Caterpillar* and the Sixth Circuit below relied the same key Commerce Clause decisions of this Court. The Michigan high court, however, interpreted those decisions as supporting the opposite conclusion as the result reached by the Sixth Circuit below—that incentives tied to in-state investment are constitutional. That irreconcilable conflict provides an independent basis for granting certiorari.

## CONCLUSION

For the foregoing reasons, and those in the petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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In The
# Supreme Court of the United States

DAIMLERCHRYSLER, INC., et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF THE RIGHT PLACE, INC., AND THE CITY OF GRAND RAPIDS AS *AMICI CURIAE* IN SUPPORT OF PETITION

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## QUESTIONS PRESENTED

The *amici curiae* will address the following questions:

1. Whether Ohio's investment tax credit, which is equally available to both Ohio residents and non-residents, violates the "non-discrimination" test this Court has articulated for analyzing whether a state tax program violates the dormant Commerce Clause.

2. Whether the "non-discrimination" test should be clarified as prohibiting only those state laws that both (1) discriminate between resident and foreign goods or businesses *and* (2) harm the national economy.

3. Whether this Court should abandon the dormant Commerce Clause doctrine in the context of state tax programs.

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## BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION

### INTEREST OF THE *AMICI CURIAE*[1]

The Right Place, Inc. (The Right Place) is a regional, non-profit economic development organization. Its mission is to promote area economic growth through high-quality employment, productivity, and technology. The program focuses on retaining existing jobs, supporting local business growth, and attracting new businesses to the Greater Grand Rapids, Michigan area.

The City of Grand Rapids (Grand Rapids) is the second largest city in Michigan, with a metropolitan region population of approximately 1,000,000. Grand Rapids has grown by 4% in the last decade – the only major urban Michigan community to do so. This economic development is the result, at least in part, of business tax incentives and other programs that encourage business retention, expansion, and relocation in the region.

The issue of what test courts will apply when evaluating the constitutionality of investment tax credits is of great importance to The Right Place and Grand Rapids. The Right Place and Grand Rapids urge this Court to clarify that the "non-discrimination" standard, used for determining whether a state tax system violates the dormant Commerce Clause, does not bar States from competing with one another for business, an activity that

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[1] Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part. In addition to *amici curiae*, their members, and their counsel, Alticor Inc. has made a monetary contribution to the preparation and submission of this brief.

advances the Commerce Clause's objective of achieving an efficient, national economy. Alternatively, The Right Place and Grand Rapids urge this Court to abandon the dormant Commerce Clause doctrine in the context of state tax programs, because the doctrine has no basis in the Constitution and has proved virtually unworkable in application, as various Justices of this Court have frequently observed. Under either of these scenarios, Ohio's investment tax credit will be preserved.

## STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. In 1998, the City of Toledo and two local school districts provided a $281 million incentive package to DaimlerChrysler to encourage maintenance of long-standing Jeep production in Toledo rather than construction of new facilities in Michigan. DaimlerChrysler accepted the incentives and opened a new Toledo plant in 2001 that employs approximately 3,800 workers. Sarah A. Webster, *Ohio Tax Credit Struck Down*, Det. Free Press, Sept. 3, 2004, 2d Edition.

2. The incentive package had two components. The first, a ten-year 100% personal property tax exemption, Ohio Rev. Code Ann. § 5709, is worth approximately $210 million. The second, an investment tax credit of 13.5% against the state corporate franchise tax for certain qualifying investments, Ohio Rev. Code Ann. § 5733.33, is worth approximately $71 million. *Id.*

3. All 50 states use some form of business incentive to promote economic development. According to the National Association of State Development Agencies, there are 1,105 different business incentives offered by the 50 states, 40% (or 445) of which are tax-based. *See* Committee to Study State and Local Taxes (created in accordance with Amended Substitute Senate Bill 261 of the 124th General Assembly of the State of Ohio), *Report of the Committee to Study State and Local Taxes* at 70 (published March 1, 2003; visited June 7, 2005) available at <http://tax.ohio.gov/taxstudy/CSSLT%20Final%20Draft.pdf> (hereinafter "Committee Report"). Nationwide, awards under programs similar to those used in Ohio have reached an estimated annual value of nearly $50 billion. Michael D. LaFaive, *Are Targeted Incentives Constitutional?*, Mackinac Ctr. For Pub. Pol'y (Dec. 1, 2003).

4. Respondents – ten Ohio taxpayers, two Michigan taxpayers, and three Ohio small businesses – filed suit over the Toledo incentive package, alleging that it was unconstitutional under the dormant Commerce Clause and Equal Protection Clause of the United States Constitution.

5. A panel of the United States Court of Appeals for the Sixth Circuit held that the investment tax credit, Ohio Rev. Code Ann. § 5733.33, was unconstitutional under the dormant Commerce Clause of the United States Constitution, but that the personal property tax exemption, Ohio Rev. Code Ann. § 5709, was constitutional. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004). The panel acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* at 743; *see also id.* at 749 ("The tax benefits under the Ohio statutes . . . are equally available to

domestic and foreign corporations. . . ."). Nonetheless, the panel held the investment tax credit unconstitutional, because the credit had the potential to "coerce" businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. *Id.* at 743-46. The panel so held even while conceding that the State of Ohio could have achieved the exact same economic effect without violating the Commerce Clause by paying a direct subsidy to benefited companies rather than offering those companies a tax credit. *Id.* at 746.

## REASONS FOR GRANTING THE WRIT

This case involves a constitutional question of national importance that affects literally hundreds of tax incentive programs across the country: whether an investment tax credit that is equally available to resident and non-resident businesses violates the dormant Commerce Clause doctrine's "non-discrimination" test. This Court should grant the Petition and answer that question "no," because such an incentive program provides all businesses with equality of opportunity – any business that invests in the taxing state will receive a tax credit. To the extent this Court's dormant Commerce Clause jurisprudence suggests that a court must further examine whether a state tax incentive program has a "coercive" effect, this Court should clarify that investment incentives are constitutionally permissible, provided that they are equally available to residents and non-residents of the taxing state, as does the Ohio tax program at issue here.

Ohio's investment tax credit program also raises broader questions about the efficacy of the "non-discrimination" test and the validity of the dormant Commerce Clause doctrine itself in this context. As various Justices of this Court have recognized, dormant Commerce Clause jurisprudence is a "quagmire," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), in large part because the doctrine lacks a textual basis in the U.S. Constitution. The Sixth Circuit's confusion in applying the Court's holdings to the Ohio investment tax credit highlights the need for an immediate clarification of the dormant Commerce Clause doctrine.

This dispute provides an ideal vehicle for articulating a return to the proper and original understanding of the non-discrimination test, namely, a focus on discrimination against "interstate commerce" itself. Under this test, the dormant Commerce Clause prohibits only those state laws that both (1) discriminate between resident and foreign goods or businesses and (2) harm the national economy. Refocusing the inquiry on harm to the national economy will at least reduce, if not completely eliminate, the quagmire, and it will also correct an error of potentially monumental proportions, given the pervasiveness of state tax incentive programs like Ohio's. That is because the test does not bar competition between states *per se*, recognizing instead that competition can be consistent with the Commerce Clause's goal of promoting an efficient, integrated, national economy and will ultimately result in more, not less, commerce.

Alternatively, the Court should abandon the dormant Commerce Clause doctrine for evaluating state tax programs. Numerous other provisions in the United States Constitution are available to protect against true monopolistic abuses of

power in such programs, and the Constitution fully authorizes Congress to rectify any perceived problems when these other protections are unavailable.

Although the Court will sometimes wait until an issue "matures" through study and interpretation by a number of lower courts, the bewildering array of dormant Commerce Clause precedents and the pervasiveness of state investment tax credit programs like Ohio's make it a virtual certainty that a circuit split will emerge. Indeed, the present dispute over Ohio's investment tax credit has been widely trumpeted as a "test" case for a national, full-scale assault on similar programs in other states. In addition, even temporary uncertainty regarding the validity of an investment tax credit may result in the loss of valuable business investment, perhaps to a competing state, but more likely to a competing country. The national economic harm that will result from the Sixth Circuit's decision, as well as the sheer enormity of future litigation, counsel strongly in favor of the Court's immediate review.[2]

## I. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE DOCTRINE, BECAUSE THE CREDIT IS EQUALLY AVAILABLE TO IN-STATE AND OUT-OF-STATE BUSINESSES.

The United States Constitution authorizes "Congress ... To regulate Commerce with foreign Nations, and

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[2] Plaintiffs do not disagree with the propriety of this Court's review, as noted in their own Petition for a Writ of Certiorari: "In light of the importance of the issues raised by this case, [Plaintiffs] do not intend to oppose [Defendants'] anticipated petitions for review of the constitutionality of Ohio's investment tax credit."

among the several States. . . ." U.S. Const. art. I, § 8, cl. 3. On its face, the Commerce Clause authorizes Congress, rather than the courts, to ensure "an area of trade free from interference by the States." *Boston Stock Exchange*, 429 U.S. at 328. Nonetheless, this Court has grafted a "negative" or "dormant" aspect to the Commerce Clause, to limit the States' right to tax interstate commerce. *Cuno*, 386 F.3d at 742.

This Court articulated the current test for measuring state tax programs against the dormant Commerce Clause doctrine in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).[3] Under that test, a tax provision is constitutionally valid if "(1) the activity taxed has a substantial nexus with the taxing State; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state." *Cuno*, 386 F.3d at 742, citing *Complete Auto Transit*. Here, the parties agree that the Ohio investment tax credit satisfies parts one, two, and four of the *Complete Auto Transit* test; the only dispute is whether Ohio's tax program violates the "non-discrimination" test.

There is nothing "discriminatory" about the Ohio tax program. Even the Sixth Circuit panel properly recognized that "[t]he tax benefits under the Ohio statutes . . . are equally available to domestic and foreign corporations and

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[3] The Court has adopted – and disposed of – many other tests under the doctrine. *See American Trucking Assocs. v. Michigan Public Serv. Comm.*, 125 S. Ct. 2419, 2426 (2005) (Scalia, J., concurring) (cataloguing the "various tests from [the Court's] wardrobe of ever-changing negative Commerce Clause fashions").

classify corporations on the basis of new investment in economically depressed areas." 386 F.3d at 749; *see also id.* at 743 ("the investment tax credit at issue here is equally available to in-state and out-of-state businesses").

This equality of opportunity exists because the Ohio corporate franchise tax and accompanying investment tax credit apply only to business activity that takes place in Ohio. *See generally* Ohio Rev. Code Ann. §§ 5733.05, 5733.33. And the fact that Ohio's tax applies only to Ohio business activity distinguishes it from the tax programs this Court held unconstitutional in the three dormant Commerce Clause cases on which the panel relied, *Boston Stock Exchange*, 429 U.S. 318 (1977), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), each of which involved a tax on out-of-state business activity. *See Cuno*, 386 F.3d at 744 (noting that in *Boston Stock Exchange*, the tax program "caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales"); *id.* (discussing *Maryland v. Louisiana*, which involved Louisiana's first-use tax on natural gas extracted from the federally owned outer continental shelf); *id.* at 744-45 (analyzing *Westinghouse*, which involved New York's tax on Domestic International Sales Corporation (DISC) subsidiaries without regard to where the DISC conducted or transacted business).[4] Accordingly, the Ohio investment tax credit is constitutional, and this Court should grant the Petition and reverse.

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[4] Indeed, Westinghouse argued that New York "was taxing income that did not have a jurisdictional nexus to the State." 466 U.S. at 395-96.

## II. THIS COURT SHOULD ACCEPT THE PETITION TO CLARIFY THE "NON-DISCRIMINATION" PART OF THE DORMANT COMMERCE CLAUSE TEST.

Notwithstanding the equality of opportunity available to residents and nonresidents under Ohio's investment tax program, the Sixth Circuit struck down the program for violating the dormant Commerce Clause. The panel reached its conclusion based on plaintiffs' argument that Ohio is "coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." *Cuno*, 386 F.3d at 743.

Respondents' "coercion" or "anti-incentive" argument is suggested by *dicta* in some of this Court's decisions, as the panel observed. In *Boston Stock Exchange*, for example, this Court criticized New York's exchange tax program because it "foreclose[d] tax-neutral decisions." 429 U.S. at 331. Similarly, in *Maryland v. Louisiana*, this Court disapproved of Louisiana's first-use tax because it "encourage[d] natural gas owners involved in the production of [offshore] gas to invest in mineral exploration and development within Louisiana rather than to invest in further [offshore] development or in production in other States." 451 U.S. at 757. In other words, there is language in at least some of this Court's decisions that appears to endorse the notion that the "non-discrimination" test looks to equality of outcome, rather than or in addition to equality of opportunity. Under such a test, a tax program will be invalidated if the expected change in business behavior results in a benefit to one state at the expense of other states. Indeed, it was on this basis that the Sixth Circuit distinguished and sustained Ohio's personal property tax exemption. *See* 386 F.3d at 747-48 (citing a

law review article explaining why a personal property tax exemption is "non-coercive").

The problem with an equality of outcome test for evaluating "non-discrimination" is that state competition or incentive for business investment can and often will advance the Commerce Clause objective of achieving an efficient, integrated national economy. If a business entity moves to a state where it will be more productive and contribute more to the national economy, the macro objective of an efficient, integrated economy will be advanced, even though the micro effect may be to disadvantage the economy of the deserted state. As one commentator has observed:

> If national wealth enhancement was a primary objective of the federalizing bargain, then efforts to increase the size of the social pie, by matching firms with their most productive jurisdiction, is not inconsistent with that bargain. To the contrary, it is entirely consistent as long as those economies, once realized, are available to all. Policies that have this purpose or effect are qualitatively different from a statutory scheme that merely transfers wealth or that creates an artificial monopoly that frustrates transactions that would otherwise occur.

Clayton P. Gillette, *The Law and Economics of Federalism: Business Incentives, Interstate Competition, and the Commerce Clause*, 82 Minn. L. Rev. 447, 483 (1997).

Moreover, when carried to its logical conclusion, the broader test for "non-discrimination" that the Sixth Circuit articulated and applied will result in absurd outcomes. For example, if Ohio chooses to attract more business investment by eliminating its business tax

completely, no one could dispute that Ohio is free to join the other states that have already done so. But under the Sixth Circuit's broad test, elimination of all business taxes is "discriminatory," because it benefits only businesses located in Ohio, impermissibly incentivizing non-Ohio businesses to relocate there. This result makes no sense, yet, it is the natural consequence of a broader test that examines equality of outcome rather than equality of opportunity. *See* Edward A. Zelinsky, *Cuno v. Daimler-Chrysler: A Critique*, 34 State Tax Notes 37, 38 (Oct. 4, 2004).

In sum, if this Court is to continue recognizing a dormant Commerce Clause doctrine in this context at all, it is essential that the Court make clear that state incentives are not inherently unconstitutional. Rather, it is only when a state incentive diminishes the *national* economy that it runs counter to the Commerce Clause. "The free flow of interstate commerce is not an end in itself; it is an instrumental good, valued for its contribution to the efficient operation of the national economy." Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 Wm. & Mary L. Rev. 1191, 1216 (1998); *see generally American Trucking Assocs. v. Michigan Public Serv. Comm.*, 125 S. Ct. 2419, 2423 (2005) (the dormant Commerce Clause "prevents a State from 'jeopardizing the welfare of the Nation as a whole'") (quotation omitted); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949) ("this Court has advanced the solidarity and prosperity of the Nation" by applying the dormant Commerce Clause doctrine). Thus, to the extent the "nondiscrimination" test evaluates equality of outcome instead of or in addition to equality of opportunity, as the Sixth Circuit held, the test must be clarified to conform with the

original understanding of the test. In other words, a tax cannot discriminate against "interstate commerce" itself. *Cuno*, 386 F.3d at 742 (citing *Complete Auto*). Under this test, a state tax incentive program is invalid only if it both (1) discriminates between resident and foreign goods or businesses *and* (2) harms the national economy.

This "harm to the national economy" standard explains why state tariffs are "virtually *per se* invalid" under the dormant Commerce Clause. *Camps Newfound/ Owatonna v. Town of Harrison*, 520 U.S. 564, 565 (1997) (Thomas, J., dissenting) (citations omitted). A tariff artificially inflates the cost of competing goods, driving up prices and thus lowering demand. An escalating tariff war between competing states will inevitably result in a net decrease in commerce, the very evil the dormant Commerce Clause doctrine was created to prevent.

The "harm to the national economy" standard also explains why subsidies do not "ordinarily run afoul" of the Commerce Clause. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). Unlike a tariff, a subsidy artificially deflates the cost of competing goods, thereby lowering prices and increasing demand. An escalating subsidy war between competing states will result in a net increase in commerce.

Applying this test to the present case, Ohio's investment tax credit is permissible because, if replicated in all states that impose a business tax (the so-called "internal consistency" test, *see American Trucking*, 125 S. Ct. at 2425), it would result in lower corporate taxes and more national commerce. Just as states are permitted to compete for business investment based on their climate and the quality of their workforce, they should be allowed to

use subsidies and tax abatements to bid for scarce investment resources, because competition is an effective way to allocate resources to the party that most highly values them:

> Certainly those law professors who contend that federal intervention is necessary to prevent states from engaging in explicit bidding for businesses have not suggested that there exists any Commerce Clause barrier to state law schools offering some salaries out of line with those of others in order to attract or retain faculty members.

Gillette, 82 Minn. L. Rev. at 450.

A "harm to the national economy" test is also consistent with the precedent on which the Sixth Circuit relied below. In *Westinghouse*, the New York tax program increased tax liability proportionately with increases in export shipping activities in other states. *Cuno*, 386 F.3d at 745. If replicated in all states, this scheme would raise taxes nationally, just like a tariff, thus stifling commerce. The same is true in *Boston Stock Exchange*, where the New York tax program "caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales." *Cuno*, 386 F.3d at 744. The anti-commerce effect was also present in *Maryland v. Louisiana*, where, if every state replicated Louisiana's tax program, all Outer Continental Shelf gas exploration and development would cease, notwithstanding the potential national economic benefits of pursuing OCS development.

In sum, a "harm to the national economy" test would first ask whether a state tax program treats in-state and out-of-state goods or businesses differently. The test would then examine whether the program will create a spiral of

protectionism that raises prices and clogs commerce, or inspires a competitive transformation in which each state must improve its own package to attract new capital.[5] This test, unlike the "non-discrimination" test the Sixth Circuit applied, draws a clear distinction between a tax program creating an artificial monopoly that inhibits transactions, and a program designed to attract investment by creating a competitive advantage that other states are free to copy.

## III. ALTERNATIVELY, THIS COURT SHOULD ABANDON THE DORMANT COMMERCE CLAUSE DOCTRINE IN THE CONTEXT OF STATE TAX PROGRAMS.

Although it is possible to preserve the dormant Commerce Clause doctrine while allowing states to compete for business investment, the fact remains that the doctrine "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting). Moreover, the doctrine alters the constitutionally proscribed balance of federalism by vesting interstate dispute resolution in the judiciary, instead of Congress, and it lacks a theoretical justification despite years of academic and judicial effort. The time is ripe for this Court to consider whether the doctrine should

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[5] "Discrimination" is still a necessary part of the test, even if the program is otherwise harmful to commerce. A state sales tax, for instance, if replicated in every state, would have the effect of raising prices and clogging commerce, but it does not violate the Commerce Clause because it is applied equally to all goods sold within a state's borders. All goods, whether produced in-state or out-of-state, have equality of opportunity.

be abandoned entirely in the context of state tax programs.

The dormant Commerce Clause doctrine started quite innocently. Shortly after the thirteen colonies ratified the Articles of Confederation, they began to enact protectionist trade barriers:

> Massachusetts goods, for example, were subject to discriminatory duties in Connecticut, and Delaware goods were subject to similar duties in Pennsylvania. New York imposed clearance fees on coastal ships visiting its ports, and also imposed fees on boats carrying vegetables that were rowed across the Hudson River. Discriminatory duties almost immediately invited retaliation by other states in the form of imposition of similar duties.

Joseph F. Zimmerman, *Interstate Relations: The Neglected Dimension of Federalism* 117 (1996). *Accord Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005) ("The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. . . . Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.") (citations omitted).

Following the Constitution's ratification, this Court fashioned the dormant Commerce Clause doctrine to prevent the type of protectionist behavior evidenced during the days of the Articles of Confederation. As this Court stated in 1949:

> Neither the power to tax nor the police power may be used by the state of destination with the

> aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce.

*H.P. Hood & Sons*, 336 U.S. at 539.

Since that time, however, this Court's foray into dormant Commerce Clause jurisprudence has wandered "well beyond the invalidation of obviously discriminatory taxes on interstate commerce." *Camps Newfound/ Owatonna*, 520 U.S. at 618 (Thomas, J., dissenting). In addition, the jurisprudence has failed to recognize, let alone adapt to, the increasing fluidity of economic transactions in a global economy.

When the doctrine was first created, a complex commercial transaction involved rowing vegetables across the Hudson River. Now, in a time when the gross revenue of some multi-national corporations exceeds the Gross National Product of many countries, Ohio competes not only with Maryland, but with Malaysia, Moldova, and Mexico for the benefits flowing from commercial transactions. *See* Vada Waters Lindsey, *Tax Incentive: The Vulnerability of Using Tax Incentives in Wisconsin*, 88 Marq. L. Rev. 107 (2004) (stating that "[m]ore than three million jobs have been lost in the United States during the last three years. Since March 2001, manufacturing jobs accounted for 90% of all job losses. Many jobs were lost to China, India, and Mexico."); Dave Carpenter, *Manufacturing Shifts Sow Uncertainty*, Chi. Trib., Dec. 8, 2003, at 6 ("There's no statistical quibble about the impact of overseas competition. Numerous companies, from heavyweight multinational corporations to comparatively small firms,

have switched production to low-priced labor sites in China, India or Mexico.").

Meanwhile, the doctrine's shifting meaning and indeterminate tests have resulted in differing results "based merely 'on differing assessments of the force of competing analogies.'" *Camps Newfound/Owatonna*, 520 U.S. at 619 (Thomas, J., dissenting, quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 196 n.7 (1995)). And numerous past and present Justices of this Court have criticized the doctrine as nothing less than a morass. *See, e.g., Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 17 (1986) (Burger, C.J., concurring in part) (referring to "the cloudy waters of the Court's 'dormant Commerce Clause' doctrine"); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 701 (1981) (Rehnquist, J., dissenting) (recognizing that "the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused"); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959) (Clark, J.) (stating that the dormant Commerce Clause doctrine is a "tangled underbrush"); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 189 (1940) (Black, J., joined by Frankfurter and Douglas, J.J., dissenting) (criticizing the dormant Commerce Clause as arising out of "[s]pasmodic and unrelated instances of litigation [that] cannot afford an adequate basis for the creation of integrated national rules" that "Congress alone" is positioned to develop).

The present dispute is illustrative of the confusion and ambiguity the doctrine engenders. Respondents articulated below *eight* different tests for determining whether a tax was discriminatory. *See* Appellants' Br. at 22, 29. Petitioner DaimlerChrysler responded to many of

these tests, then added another. *See* Appellee Daimler-Chrysler's Br. at 29-34 (stating that "the credit's similarity to a subsidy should be decisive"). Appellee State of Ohio recognized that "[t]he parties completely disagree . . . on the lessons to be drawn from a careful analysis of the case law." *See* Appellee State of Ohio's Br. at 15.

In light of the pervasive problems the doctrine has caused, it is more than a little ironic that legislation has often cured state tax policies perceived to be anticompetitive, the very remedy that the Commerce Clause's text plainly endorses. For example:

> [T]he tax exemptions at issue in *Bacchus* were designed to expire and did expire. Thus, Hawaii's internal political processes ultimately eliminated those exemptions. Similarly, as to New York's securities transfer tax, Congress legislated while *Boston Stock Exchange* made its way through the courts. In the same vein, Congress has long legislated on the subject of milk prices and supports.

Edward A. Zelinsky, *Restoring Politics to the Commerce Clause*, 29 Ohio N.U.L. Rev. 29, 84 (2002);[8] *accord Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (validity of a state tax program "is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve"). In short, Congress, the People's elected representative body, can and should decide in the first instance whether it is acceptable for Ohio to

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[8] Conversely, Congress has also acted at times to give its blessing to challenged tax programs. *See, e.g.*, the McCarren-Ferguson Act, 15 U.S.C. § 102(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.").

enact a tax credit program that encourages investment in Ohio.

Abandoning the dormant Commerce Clause doctrine in the context of state tax programs would not leave the states exclusively with a legislative remedy when faced with an alleged anti-competitive tax. Numerous other constitutional provisions have been and will continue to be used to strike blatantly protectionist tax programs. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 879-80 (1985) (rejecting dormant Commerce Clause challenge but holding that Alabama's higher gross premiums tax on foreign insurers violated the Equal Protection Clause); *Toomer v. Witsell*, 334 U.S. 385, 396-98 (1948) (higher license fee on nonresident shrimp fishermen violated the Privileges and Immunities Clause); *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 13-15 (1983) (invalidating Hawaii gross receipts tax imposed on airlines, concluding the tax was preempted under the Supremacy Clause by the Airport Development Acceleration Act of 1973); *cf.* U.S. Const. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .").

In sum, the time is ripe to extract the federal courts from the impenetrable "quagmire" that is the dormant Commerce Clause and return the job of overseeing competing state tax programs to Congress. This Court should take the opportunity presented by this case to grant the Petition and abandon the doctrine as applied to state tax programs.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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DAIMLERCHRYSLER CORPORATION, *et al.*,
*Petitioners*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

## INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners, DaimlerChrysler Corporation, *et al.*[1] Tax Executives Institute, Inc. ("TEI" or "the

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. TEI has received the written consents of Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). TEI has approximately 5,700 members who represent more than 2,800 of the leading corporations in the United States, Asia, Canada, and Europe. Institute members represent a cross-section of the business community whose employers are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of all business taxpayers.

Today, TEI has nearly 600 members within the 4 states of the Sixth Circuit, and a majority of the Institute's other members work for companies whose activities (measured, for example, by property, payroll, or sales) extend into the Sixth Circuit. Moreover, many of these companies have availed themselves of the tax incentives at issue here (or to similarly structured incentives offered by other States). Because this case implicates the constitutionality of every state and local tax incentive and, regardless of its disposition, may markedly affect all U.S. state and local tax systems, it is of interest to all TEI members.

By striking down Ohio's investment tax credit, the U.S. Court of Appeals for the Sixth Circuit upset the settled expectations of companies investing in new plants and equipment in Ohio in reliance on the State's investment tax credit. Further, it deprived Ohio (and similarly situated States) of an important and time-honored mechanism for encouraging job-creating investments. Finally, this case raises fundamental

issues under the Commerce Clause about the States' freedom to compete for interstate commerce and foster economic development within their borders. A writ of certiorari should issue to permit this Court to confirm that the Commerce Clause does not restrict States' efforts to advance legitimate state interests through their tax systems. As individuals who contend daily with the interpretation and administration of tax laws nationwide, the Institute's members—and their employers—have a vital interest in the proper disposition of this case.

## SUMMARY OF ARGUMENT

1. Following Ohio's enactment of an investment tax credit to encourage economic development, DaimlerChrysler built a vehicle-assembly plant in Toledo, entitling the company to a credit against Ohio's corporate franchise tax. A taxpayer group challenged Ohio's grant of a tax credit as violating the Commerce Clause of the U.S. Constitution. The U.S. Court of Appeals for the Sixth Circuit agreed, striking down the credit. Should the Court grant the petition for a writ of certiorari to clarify the scope of the Constitution's bar on discriminatory taxes? *Amicus* TEI submits that it should.

2. During the past three decades, this Court has invoked the Commerce Clause to invalidate state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers. While the Sixth Circuit was correct to consider those decisions in weighing the constitutionality of the Ohio investment tax credit, it erred in concluding that the Court's jurisprudence mandated striking down Ohio's investment tax credit.

3. In *Boston Stock Exchange v. State Tax Comm'n*,[2] this Court held a New York transfer tax that more heavily taxed stock transfers if they occurred outside the state to violate the

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[2] 429 U.S. 318 (1977).

Commerce Clause. *Boston Stock Exchange* has since provided the lens for reviewing the constitutionality of state taxing schemes.

4. Seven years after *Boston Stock Exchange*, the Court decided *Westinghouse Electric Corp. v. Tully*,[3] a case involving a franchise tax credit. The Court said that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The tax scheme was constitutionally flawed because the manner in which the credit was computed created a greater tax burden on receipts from out-of-state DISC sales. *Bacchus Imports Ltd. v. Dias*,[4] decided the same year as *Westinghouse*, dealt with a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages. The statute on its face did not discriminate against out-of-state distributors, but the Court found that the reciprocal benefit accorded Hawaii's local liquor products and industry violated the Commerce Clause. More recently, in *New Energy Co. of Indiana v. Limbach*,[5] the Court struck down an ethanol tax credit applied against Ohio's motor vehicle fuel sales tax for fuel produced in the state. *New Energy* added the principle to the discriminatory-tax-bar landscape that reciprocity will not remediate otherwise facial discrimination.

5. Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. Regrettably, the Court of Appeals misapprehended the Court's jurisprudence and improperly invalidated Ohio's investment credit.

6. Not every difference in treatment constitutes discrimination. TEI submits that four distinguishing characteristics of

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[3] 466 U.S. 388 (1984).

[4] 468 U.S. 263 (1984).

[5] 486 U.S. 269 (1988).

Ohio's investment tax credit at issue here render it constitutional: (a) Ohio is not discriminating against products manufactured or business operations performed in any other State, (b) the investment tax credit is not related to discrete transactions and it does not target a particular product or industry, (c) the amount of the credit does not change relative to activities in other states, and (d) Ohio's statute does not discriminate on its face but rather is freely available to any corporation engaging in the prescribed activities in Ohio.

7. Although this Court invalidated the state tax incentives in *Boston Stock Exchange* and the other cited cases, in each case it affirmed the ability of the states to foster economic growth within their borders. The Court observed that the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in exercising their power to tax turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[6] Thus, the distinguishing characteristics of the tax credit at issue are highly significant.

8. Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals muddled Commerce Clause jurisprudence, potentially leaving every state tax incentive vulnerable to challenge. While the limitations imposed by the Commerce Clause are real, they do not vitiate the power reserved to the States in our federal system. Where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face (i.e., its effect is readily available to all), and (c) does not directly burden out-of-state interests, it should be sustained.

9. Investment tax credits, along with an array of other tax incentives, are widely used by States to encourage growth in economically distressed areas, spur investment, increase

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[6] 429 U.S. at 329.

jobs, and hence, enlarge the tax base. Left intact, the Court of Appeals' determination will deprive States of the ability to manage their economies and deny taxpayers the certainty they rightly need to plan and conduct their business affairs.

10. Should the result in this case remain unchanged, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and taxpayers will be upended. The Court should review the decision in order to clarify the Commerce Clause's bar on discriminatory taxation and restore certainty to the area.

## ARGUMENT

In 1997, Ohio enacted a tax credit to spur capital investment within the State.[7] Any company, whether or not already present in Ohio, could qualify for a 7.5-percent credit against its Ohio franchise tax liability by increasing its investment in manufacturing in the state. Further, capital investment occurring within specifically designated areas was eligible for an enhanced credit of 13.5 percent, thereby allowing the State to target economically depressed areas.

In 1998, DaimlerChrysler added a manufacturing facility to an existing plant in Toledo that satisfied the requirements for the enhanced investment tax credit. In addition, DaimlerChrysler negotiated a 10-year real property tax exemption with the City of Toledo.

In 2000, several Ohio and Michigan taxpayers (collectively referred to as "Cuno") sought declaratory and injunctive relief contending that Ohio's investment tax credit and the property tax exemption were unconstitutional. Specifically, Cuno argued that the preferential treatment accorded in-state investment under Ohio law, as well as the property tax exemption granted by Toledo, discriminated against interstate commerce

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[7] Ohio Rev. Code § 5733.33.

in violation of the Commerce Clause of the U.S. Constitution.[8] The district court dismissed the complaint.[9] On appeal, the Court of Appeals reversed, holding that the investment tax credit violates the Commerce Clause. At the same time, the Court found that Ohio's property tax incentive did not violate the Commerce Clause.[10]

## I. THE SIXTH CIRCUIT MISAPPREHENDED THIS COURT'S PRECEDENTS AND MUDDLED ITS COMMERCE CLAUSE JURISPRUDENCE BY STRIKING DOWN OHIO'S INVESTMENT TAX CREDIT

During the past three decades, this Court has invoked the Commerce Clause to invalidate state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers. While the Sixth Circuit was correct to consider those decisions in weighing the constitutionality of the Ohio investment tax credit, the court erred in concluding the Court's jurisprudence mandated its decision. Indeed, a careful review of the cases confirms that, while "the scope of the doctrine that bars discriminatory taxes has not been clearly delineated,"[11] the Sixth Circuit distended the applicable precedents in striking down Ohio's investment tax credit.

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[8] U.S. CONST. art I, § 8, cl. 3.

[9] The challenge to the Ohio statute was originally filed in the Lucas County, Ohio, Common Pleas Court, but was removed to the U.S. District Court for the Northern District of Ohio.

[10] App. 1a. "App." references are to the various appendices bound with the Petition for a Writ of Certiorari, *DaimlerChrysler Inc.*, et al. *v. Charlotte Cuno*, et al., No. 04-1704 (filed Jun. 17, 2005). The real property tax exemption is the subject of the Cuno's Petition for a Writ of Certiorari in *Charlotte Cuno*, et al. *v. DaimlerChrysler Inc.*, et al., No. 04-1407 (filed Apr. 18, 2005).

[11] App. at 5a.

In *Boston Stock Exchange v. State Tax Comm'n*,[12] this Court struck down a New York transfer tax that more heavily taxed stock transfers occurring outside the state. A unanimous court concluded that "because it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York tax . . . falls short of the substantially evenhanded treatment demanded by the Commerce Clause."[13] Holding that "no state may discriminatorily tax the products manufactured or the business operations performed in any other state,"[14] *Boston Stock Exchange* has provided the lens for reviewing the constitutionality of state taxing schemes.

Seven years after *Boston Stock Exchange*, the Court took up the issue of discriminatory taxation in *Westinghouse Electric Corp. v. Tully*,[15] a case involving a franchise tax credit. Following enactment of a federal tax law granting preferential treatment to export sales by "Domestic International Sales Corporations" (DISCs), New York amended its tax statute to include income from DISC sales in the income of the parent corporation for New York corporate tax purposes. At the same time, New York provided a tax credit that varied depending on whether the DISC sales originated in New York as well as on the relative proportions of the taxpayer's New York and non-New York DISC sales. It was the credit provisions that prompted the Court to strike down the New York scheme as discriminatory. Citing *Boston Stock Exchange*, the Court said that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The tax scheme was constitutionally flawed because the manner in which the credit was computed created a greater tax burden on receipts from out-of-state DISC sales.

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[12] 429 U.S. 318 (1977).

[13] *Id.* at 332.

[14] *Id.* at 337.

[15] 466 U.S. 388 (1984).

In 1984, the Court also decided *Bacchus Imports Ltd. v. Dias*,[16] a case involving a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages. Although the statute did not facially discriminate against out-of-state distributors, the Court found that the reciprocal benefit afforded to Hawaii's local liquor products and industry violated the Commerce Clause.

*Westinghouse* and *Bacchus Imports* crystallized the governing principles in this area. Both decisions affirmed the core holding of *Boston Stock Exchange*, and answered some remaining questions. First, the prohibition on discriminatory taxes applies not only to indirect, transaction-based taxes (like the transfer tax in *Boston Stock Exchange*), but also direct taxes, like income taxes. Second, the bar reaches tax schemes providing a tax benefit (credit or exemption) to in-state businesses or operations, as well as state statutes penalizing out-of-state activity. Finally, tax statutes need not be discriminatory on their face to be inimical to the Commerce Clause.

More recently, the Court addressed the constitutionality of a state tax credit in *New Energy Co. of Indiana v. Limbach*.[17] There, the Court addressed a challenge to an ethanol tax credit against Ohio's motor vehicle fuel sales tax for fuel produced in the State. Although the credit was available in a reciprocal fashion for ethanol produced in other States to the extent other States provide a credit for ethanol produced in Ohio, the Court struck it down on the grounds that the Ohio provision "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination."[18] *New Energy*

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[16] 468 U.S. 263 (1984).

[17] 486 U.S. 269 (1988).

[18] 486 U.S. at 274.

added the principle to the discriminatory-tax-bar landscape that reciprocity will not remediate otherwise facial discrimination.

Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. While Ohio's investment tax credit was intended to and in fact did provide an incentive to taxpayers to invest in the State, *amicus* TEI submits the statute does not run afoul of the neutrality required by the Commerce Clause. Thus, while the Court of Appeals' attempt to reconcile this Court's decisions is laudable, the court misapprehended the nuances and significance of the Court's jurisprudence. As a result, it erred in invalidating Ohio's investment credit.

TEI submits that distinguishing characteristics of Ohio's investment tax credit enable it to pass constitutional scrutiny. Unlike the circumstances in *Boston Stock Exchange*, Ohio is not discriminating against products manufactured or business operations performed in any other State. Indeed, the credit here does not relate to a transaction tax at all, but rather to the State's franchise tax. The tax credit is also distinguishable from the exemption in *Bacchus* because, first, it is not related to a transactional tax, and second, it does not target a particular product or industry. As for *Westinghouse*, the credit is different because the amount does not change relative to activities in other States. In other words, the Ohio investment tax credit encourages increased investment in the State (like the *Westinghouse* credit), but it does not directly discourage additional investment in other States (unlike the *Westinghouse* credit). Indeed, since the credit applied to Ohio's corporate franchise tax, the tax involved only applies to activities in Ohio.[19] Moreover, although the credit at issue in *Westing-*

[19] The credit in *Westinghouse* varied depending on the relative proportion of the taxpayer's New York and non-New York sales. 466 U.S. at 400.

*house* was applied against New York's corporate income tax, it was calculated on a transaction-by-transaction basis (*i.e.*, on the basis of DISC sales); here, Ohio's investment tax credit was computed on the basis of the company's investment in plant and equipment. Finally, unlike the statute in *New Energy*, the Ohio tax credit is, again, not transaction based and does not discriminate on its face: It is available to any corporation engaging in the prescribed activities in Ohio, and reciprocity is not an issue.

These distinctions are highly significant given this Court's recognition that States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry" and may "compete with other States for a share of interstate commerce."[20] As the Court observed in *Boston Stock Exchange*, when making the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in the exercise of their power to tax, the result turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[21]

Not every difference in treatment constitutes unconstitutional discrimination. Thus, although this Court invalidated the state tax incentives in *Boston Stock Exchange* and the other cited cases, in each case it also affirmed the ability of the States to foster economic growth within their borders. The Court declared in *Boston Stock Exchange* that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry."[22] In *Westinghouse*, the Court averred that "[w]e do not hold that a State may not compete with other States for a share of interstate

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[20] *Boston Stock Exchange*, 429 U.S. at 336-37.

[21] *Id.* at 329.

[22] *Id.* at 336.

commerce; such competition lies at the heart of a free trade policy,"[23] and elaborated in *Bacchus* that "[a] State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."[24] And in *New Energy*, the Court confirmed that the Commerce Clause "does not prohibit *all* state action designed to give its residents an advantage in the marketplace."[25]

This Court's decisions teach that where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face (i.e., its effect is readily available to all), and (c) does not directly burden out-of-state interests, it should be left intact. Where both in-state and out-of-state companies are eligible to receive investment tax credits, as in this case, the Commerce Clause should not preclude such incentives. In other words, tax incentives should be sustained so long as they do not penalize out-of-state activity. Since any taxpayer, including non-domiciliary companies such as DaimlerChrysler here, may avail itself of the benefits afforded by the Ohio investment credit, the credit should be sustained. This is the essence of the free-trade and open competition that the Commerce Clause should permit while guarding against predatory and discriminatory state practices.

Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals fashioned a decision that muddles Commerce Clause jurisprudence and potentially leaves every state tax incentive vulnerable to challenge. Indeed, since the Sixth Circuit rightly upheld the property tax exemption that DaimlerChrysler claimed regarding the new plant and equipment, while striking down the investment tax credit, it is

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[23] 466 U.S. at 407 n.12.

[24] 468 U.S. at 271.

[25] 486 U.S. at 278 (emphasis added).

difficult to fathom what type of incentives might survive scrutiny.

In summary, while the limitations imposed by the Commerce Clause are real, the Clause does not vitiate the power reserved to the States in our federal system. Nearly all states have some type of tax incentive to encourage in-state economic activity, and more than 30 offer an investment tax credit analogous to Ohio's. In California, for example, placing into service qualifying property after January 1, 1994, yielded a manufacturer's investment credit for many taxpayers.[26] In Illinois, taxpayers may claim a credit in respect of qualifying property placed in service between July 1, 1984, and January 1, 2004.[27] And in New York, an investment tax credit related to qualifying property acquired after December 31, 1968, is available to taxpayers.[28] These are but three examples of investment tax credits; by one recent survey, more than 330 income or franchise tax incentives exist.[29] More fundamentally, the Court of Appeals decision implicates even the most neutral (and basic) tax policy decisions, such as lowering a tax rate or narrowing a tax base compared with other states, as "discriminatory." Accordingly, it is critical for this Court to take up this case and reverse the decision below.

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[26] Cal. Rev. & Tax. Cd. § 23649(a)(1). The California credit is not available for property placed in service after January 1, 2004.

[27] Ill. Admin. Code 86 § 100.2101(a).

[28] N.Y. Tax Law § 210(12).

[29] Timothy H. Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. Tax'n 359, 360 (2005) (citing Mark L. Nachbar, *Credits and Incentives: Alabama Through Hawaii*, 1450 T.M. (BNA) (2005)).

## II. LET STAND, THE DECISION BELOW WILL REVERBERATE THROUGH THE ECONOMY, UPENDING SETTLED EXPECTATIONS OF BOTH BUSINESSES AND THE STATES

Investment tax credits, along with an array of other tax incentives, are widely used by states to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base. If not reversed, the Court of Appeals' determination will reverberate through the Sixth Circuit and across the country to the detriment of taxpayers and States alike. States will be denied the ability to manage their economies and taxpayers will be deprived of the certainty they rightly need to plan and conduct their business affairs.

The importance of Ohio's investment tax credit is beyond dispute: In this case alone, it spurred the creation or retention within the State of more than 4,000 jobs and prompted a $1.2 billion expansion by DaimlerChrysler.[30] In 2004, Ohio's Development Director worked with more than 193 companies to expand or locate in Ohio, representing more than 53,000 jobs in Ohio.[31] And Ohio is not just competing with other States: It, like other States, faces increasing competition from Canada, Mexico, and Asia to secure and retain businesses. Ohio, through this credit, is simply pursuing a tax policy strategy to encourage investment within its borders and boost its economy.

Should the result in this case remain unchanged, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and tax-

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[30] Bruce Johnson, Testimony before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives (May 24, 2005) (transcript available in TEI's offices).

[31] *Id.*

payers upended. Not only will taxpayers that have detrimentally relied on the states' actions be severely disadvantaged, but the attendant uncertainty will discourage further investment by other taxpayers and thus frustrate the States' incentive efforts. The Court should review the decision in order to clarify the Commerce Clause's bar on discriminatory taxation and restore certainty to the area.

## CONCLUSION

For the foregoing reasons, the Court should grant DaimlerChrysler's Petition for a Writ of Certiorari and reverse the decision below invalidating Ohio's investment tax credit.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITION FOR A WRIT CERTIORARI

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No. 04-1704

IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

*Petitioner*,

v.

CHARLOTTE CUNO, ET AL.,

*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.[1]

The Tax Foundation is a non-profit research organization formed in 1937 to educate taxpayers about sound tax policy. In this regard, the Tax Foundation disseminates information on taxes and promotes tax systems that are simple, fair, and favor economic growth. The Tax Foundation works to further this mission by educating the legal community on economic issues relating to tax law, educating lawmakers and the public on tax law issues in an understandable and relevant manner, and promoting that judicial decisions on tax law advance economic growth and tax competition.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of the Petitioner and Respondents have been obtained and filed with the Clerk of the Court.

## SUMMARY OF ARGUMENT

This Court's guidance is needed to prevent immediate and permanent harm to commerce, particularly in Sixth Circuit states. The Court should grant certiorari because the Sixth Circuit's ruling imperils the ability of the states—especially those in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee)—to compete for investment. This case involves an important issue of federalism: It affects the balance of authority between the federal and state governments. The Sixth Circuit has severely limited states' autonomy in adopting their own competitive tax policies. Accordingly, this is exactly the kind of case this Court needs to decide.

This Court should also grant certiorari to provide needed clarity to its own decisions on the limitations imposed by the Commerce Clause on state tax authority. This Court's own sweeping language in several of its opinions serves, in part, as the basis for the lawsuit in this case. In fact, certain statements made by this Court, if taken literally, could serve as the basis for even more lawsuits in the future against other state tax and spending programs. This Court's review of this case is needed to clarify the standards for discrimination under the Commerce Clause.

Finally, this Court should grant certiorari to emphasize an important point: the Commerce Clause does not require a state to be more generous to out-of-state taxpayers than in-state taxpayers. The Sixth Circuit's focus on pre-existing tax liability and coercion would turn the Commerce Clause on its head and require Ohio to give investment tax credits only when an investor first comes to Ohio from another state, a ruling that cannot be squared with this Court's rulings that the Commerce Clause requires fair, not special, treatment of interstate commerce.

## ARGUMENT

### I. THIS COURT'S GUIDANCE IS NEEDED TO PREVENT IMMEDIATE AND PERMANENT HARM TO COMMERCE, ESPECIALLY IN SIXTH CIRCUIT STATES.

The Court should grant certiorari because the Sixth Circuit's ruling imperils the ability of the states—especially those in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee)—to

compete for investment. This case involves an important issue of federalism: It affects the balance of authority between the federal and state governments. The Sixth Circuit has severely limited states' autonomy in adopting their own competitive tax policies. Accordingly, this is exactly the kind of case this Court needs to decide.

The Sixth Circuit's decision invalidated a tax incentive properly enacted by Ohio. The decision represents a radical departure from any Commerce Clause case that has come before. This case has national implications that affect most corporations and most states in a major way. Indeed, nearly every state has an incentive on its books that is compromised by the Sixth Circuit's reasoning. *See* John C. Healy & Michael S. Schadewald, 1 2005 MULTISTATE CORPORATE TAX GUIDE: CORPORATE INCOME TAX 1-824 (2005) ("State competition for investment in new manufacturing plants and other business facilities is intense because of the economic growth it may foster. As a consequence, most states offer tax credits to companies that invest in facilities and create jobs in the state.").

Almost every major company benefits from those kinds of incentives. *See, e.g.*, Robert Guskind, *The New Civil War*, 25 NAT'L J. 817, 818 (1993) ("virtually every business contemplating a move or an expansion considers" incentives). And if the plaintiffs in this case properly had standing to sue, the Sixth Circuit's reasoning makes any taxpayer in the United States a potential plaintiff who could sue almost any major company in almost any state to challenge that company's receipt of an incentive.

This is not just speculation: As recently as last month, a lawsuit was filed in North Carolina challenging Dell Inc.'s right to $200+ million in tax credits. *Blinson v. North Carolina*, No. 05 CVS 8378 (Wake Co. Super. Ct., filed June 23, 2005). *See also Olson v. Kramer*, No. 62 C8 05 2727 (Ramsey County Dist. Ct., filed May 18, 2005) (citizen suit against tax incentives—the Job Opportunity Building Zones Program and Biotechnology and Health Sciences Zone Program—as violating the Commerce Clause by inducing business in tax favored zones in Minnesota rather than in another state); *DeCamp v. Nebraska*, No. 4:04 CV 03194 (D. Neb., filed May 18, 2004) (citizen suit claiming the tax incentive known as "Initiative 300" violates the Commerce Clause

by favoring farm families located in state over farm families located out of state).

Furthermore, the plaintiff's lawyers who brought the suit in Ohio have publicly stated that many other suits are in the works. *See* Amy Martinez, *Motion Challenges Dell Incentives*, NEWS & OBSERVER (Raleigh, N.C), June 24, 2005, at D1 ("Peter Enrich ... who filed the Ohio suit, said he's been approached by incentives opponents in five other states. He said all are seriously considering suing.")

State legislators and corporate decision makers need guidance in this matter. Uncertainty affects state legislatures' ability to legislate tax policy and it affects businesses' ability to rely on state tax laws to make investment decisions. Uncertainty itself is burdening the interstate commerce that the Commerce Clause is intended to protect. This Court should exercise its certiorari jurisdiction to restore certainty to state lawmakers.

### A. Up Until the Sixth Circuit's Decision, the Commerce Clause Had Been Interpreted as Promoting Tax Competition.

The Commerce Clause of the United States Constitution gives Congress the plenary authority to "regulate Commerce ... among the several States." U.S. CONST. art. I, §8, cl. 3. The Commerce Clause, in the absence of congressional action, limits state actions that unduly burden interstate commerce. Indeed, this negative (or dormant) aspect of the Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273–274 (1988). The lack of such a power under the Articles of Confederation, and the subsequent trade wars among the states, was the major reason the states gathered together to fix the Articles and, ultimately, replace them with the Constitution. *See* James Madison, *The Federalist No. 42*, *in* JAMES MADISON: WRITINGS 235, 238 (1999) ("A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter.").

Under its Dormant Commerce Clause jurisprudence, this Court has "...sustained a tax against Commerce Clause challenge when

the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). Under the discrimination prong of *Complete Auto*, this Court has routinely struck down "tariff-like" tax schemes that levy discriminatory burdens on out-of-state businesses in an effort to benefit their in-state competitors. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) ("[t]he paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State."); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) ("[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation ....").

Indeed, a common thread running through this Court's decisions is that a state may not impose a taxing scheme that is a protectionist, tariff-like measure that favors in-state taxpayers or in-state interests by imposing tariff-like tax burdens on out-of-state taxpayers or out-of-state interests. For example:

- In *New Energy*, this Court invalidated an Ohio tax credit that favored ethanol produced in Ohio.
- In *Bacchus Imports*, this Court invalidated a Hawaii tax that favored an alcohol product produced in Hawaii. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984).
- In *Boston Stock Exchange*, this Court invalidated a New York tax scheme on stock transfers in New York if the transferor used a New York stock exchange rather than an out-of-state stock exchange. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).
- In *Westinghouse*, this Court invalidated a New York tax scheme that favored companies that exported a greater proportion of their products from points in New York than from points in other states. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984).

In other words, the Dormant Commerce Clause prohibits tariff-like measures that interfere with the free flow of commerce and that interfere with tax competition.

The rationale for this prohibition is that competition "lies at the heart of a free trade policy...." *Boston Stock Exch.*, 429 U.S. at 336–337. The prohibition against tariff-like measures reflects the concern that if a tax burden "falls on economic interests without the state, it is not likely to be alleviated by political restraints which are normally exerted on legislation ... within the state." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940).

Still, this Court, in these decisions, has always emphasized that the Commerce Clause "does not prevent States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. To the contrary, this Court has emphasized that it is a "laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 385 (1991).

In sum, the Commerce Clause encourages competition—including tax competition—among the states. As each state designs its own tax system to serve the needs of its citizens, each state will develop a tax system that is more or less attractive to different business investors. Businesses are then free to choose to locate in those states where the tax systems are most advantageous for production. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) ("The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods....The greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference decision.") (citations omitted). The only limitation on this is that a state cannot set up discriminatory tax regimes that act like protectionist barriers against interstate competition.

### B. The Sixth Circuit's Ruling Uses the Commerce Clause as a Shield From Competition.

The Sixth Circuit's decision represents a significant departure from precedent. Indeed, there is no "tariff-like" tax implicated in this case. Instead, the Ohio taxpayers who brought this suit have turned the Commerce Clause on its head. They want to use the Commerce Clause to protect themselves from competition with interstate taxpayers.

The interests of the plaintiffs who brought the suit are important—those interests say a lot about the Commerce Clause claim itself. Usually, Commerce Clause challenges come from out-of-state business interests claiming unfair treatment that favors in-state business. In *Boston Stock Exchange*, stock sales in Boston were harmed by a New York law that protected the New York Stock Exchange. *Boston Stock Exch.*, 429 U.S. at 327–331. In *Bacchus Imports*, alcohol produced outside Hawaii was harmed by a Hawaii law that protected Hawaii-produced alcohol. *Bacchus*, 486 U.S. at 270–272. In *Westinghouse*, exports from points outside New York were harmed by a New York law that favored exports from points within New York. *Westinghouse Elec.*, 466 U.S. at 392–394. Indeed, it is not surprising that Commerce Clause challenges typically come from out-of-state businesses claiming unfair treatment that favors in-state interests—it is those out-of-state interests that are particularly vulnerable to discrimination because they do not have political power in the state. *See McGoldrick*, 309 U.S. at 45, n.2.

This case, therefore, is peculiar because of the unique identity of the parties who have brought the case: Ohio taxpayers have sued a multi-state business in an effort to protect themselves from tax competition in Ohio. No such case has come up before. *See* Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 381 (1996) ("the Court has not had occasion to address a challenge ... that a state tax provision's primary purpose or effect is to attract business to ... the state"). This is telling. As Justice Stevens has observed, where, as here, there has been an "absence of any previous challenge to such programs," such an absence is evidence of the fact that the "common and correct interpretation of the Commerce Clause as primarily intended to inhibit ...

restrictions on the free flow of goods within the national market rather than to provide the basis for questioning a State's right to experiment with different incentives...." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring).

In this first-of-a-kind challenge, it is clear that the Ohio taxpayers who brought this suit are not interested in the free flow of commerce. Indeed, their lawyers concede that is not what this case is about. Instead, they have explicitly stated that their intention is to "protect Ohio from Ohio." In fact, Mr. Enrich, one of the plaintiff's lawyers, tells us exactly why he brought this case:

> If all the states would refrain from deploying location incentives for businesses, then they all could retain more robust tax bases to support other governmental functions. But, if the other states are going to offer a widening array of tax breaks, then none could afford the costs -- more political than economic -- of abstaining. As a result, incentives proliferate, leaving all of the states worse off.

Enrich, *supra*, 110 HARV. L. REV. at 396; *but see* Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 448 (1997) ("The very claim that competition for business location will have a negative impact seems odd. We typically think of competition as an effective mechanism for allocating scarce social resources to the party that values them most highly, and there initially seems little reason to believe that governmental bids vary from this principle.").

Of course the problem with this pointedly political argument is that it has no place in court. The plaintiffs have brought their case to court because they have found it difficult to advance their political agenda in the state legislatures. Enrich, *supra*, 110 HARV. L. REV. at 393–395 (explaining that it is politically difficult to get state legislatures to not compete for business investment with tax incentives). Yet the fact remains that this is a state-level political matter that must be decided by state legislators. Accordingly, the plaintiffs must fail. The Commerce Clause is not intended to second-guess a state's efforts to encourage investment. The Commerce Clause is not intended to protect Ohio from Ohio.

Unfortunately, the Sixth Circuit agreed with the taxpayers' novel position. The dramatic expansion of the Commerce Clause was unexpected and radical. The decision has had dramatic effects around the country. For one, companies are now uncertain as to whether they should rely on state incentives—validly passed by state legislatures—in making their decisions to invest in a state. For another, companies that have relied on these incentives are exposed to lawsuits from any taxpayer in any state who believes that the incentives violate the Commerce Clause, as interpreted by the Sixth Circuit. As discussed above, the companies' worries are well founded. Since the Sixth Circuit's decision, more lawsuits have been filed that challenge taxpayers' rights to the benefits of these incentives. And even more are coming.

### C. Sixth Circuit States, in Particular, Need This Court's Guidance or They Will be Unable to Compete.

States vigorously compete for investment in today's economy. Despite cries of opposition to offshore "outsourcing", data from the U.S. Department of Labor indicates that most "outsourcing" involves a business moving a job from one state to another.

> Three out of four [layoff] events (90 out of 119) associated with movement of work occurred among establishments within the same company. In more than 7 out of 10 cases, the work activities were reassigned to places elsewhere in the U.S. In the 29 events in which work activities were reassigned to another company under contractual arrangements, half of the instances involved relocation of work outside the U.S. and half to companies within the U.S.

U.S. Dept. Labor, *Extended Mass Layoffs Associated with Domestic and Overseas Relocations, First Quarter 2004* (June 10, 2004), *available at* http://www.bls.gov/news.release/reloc.nr0.htm; *see also* Sharon P. Brown, *Mass Layoff Statistics Data in the United States and Domestic and Overseas Relocation*, U.S. DEPT. LABOR (Dec. 2004), *available at* http://www.bls.gov/mls/mls relocation.pdf.

In an age when international businesses have the freedom to invest nearly anywhere in the world, states are seeking to provide a

number of features to attract new investment. These features include competitive tax rates on income, tax credits for in-state investment, favorable apportionment formulas, public services such as roads and highways, and direct subsidies. All of these measures, though not equally preferable from a political or economic perspective, are intended to induce business investment that will "provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp.*, 498 U.S. at 385.

Forty-six states have investment tax credits and incentives similar to the Ohio investment tax credit struck down by the Sixth Circuit. *See DaimlerChrysler Corp. v. Cuno*, Pet. for Cert., (Supreme Court Case No. 04-1704) at 8, n.5. To compete with its sister states, the states of the Sixth Circuit maintain numerous location-based business tax incentives. Michigan has at least twelve different location-based business tax incentives, ranging from investment tax credits to minority business credits.[2] Kentucky has at least thirteen location-based business tax incentives ranging from skills training to industrial development.[3] Tennessee allows taxpayers to take up to four credits against

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[2] *See, e.g.*, Mich. Comp. Laws § 208.35a (Investment Tax Credit); Mich. Comp. Laws § 208.38g (Michigan Economic Growth Authority Credit); Mich. Comp. Laws § 208.37b (High Technology Credit); Mich. Comp. Laws § 208.38e (Apprenticeship Tax Credit); Mich. Comp. Laws § 208.37a (Enterprise Zone Credit); Mich. Comp. Laws § 208.37c (Qualified Jobs Credit); Mich. Comp. Laws § 208.38d (Brownfield Development Credit); Mich. Comp. Laws § 324.36109 (Credit for Property Taxes on Farmland Subject to Developer Rights Agreements); Mich. Comp. Laws § 208.38 (Credit for Contributions to Certain Charitable Institutions); Mich. Comp. Laws § 208.38c (Credit for Contributions to Community Foundations); Mich. Comp. Laws § 208.38b (Disability Compensation Credit); Mich. Comp. Laws § 208.39c (Historic Rehabilitation Credit).

[3] *See, e.g.*, Ky. Rev. Stat. Ann. § 141.405 (Skills Training Investment Tax Credit); Ky. Rev. Stat. Ann. § 154.22-050 (Rural Economic Development Credit); Ky. Rev. Stat. Ann. § 154.45-090 (Enterprise Zone Jobs Credit); Ky. Rev. Stat. Ann. § 154.26-090 (Economic Revitalization Credit); Ky. Rev. Stat. Ann. § 154.24-110 (Jobs Development Credit); Ky. Rev. Stat. Ann. § 141.065 (Unemployment Tax Credit); Ky. Rev. Stat. Ann. § 141.041 (Coal Manufacturing and Heating Credit); Ky. Rev. Stat. Ann. § 141.412 (Qualified Farming Operation Credit); Ky. Rev. Stat. Ann. § 154.20-258 (Investment Fund Tax Credit); Ky. Rev. Stat. Ann. § 154.34-080 (Reinvestment Tax Credit); Ky. Rev. Stat. Ann. § 141.390 (Recycling Equipment Credit); Ky. Rev. Stat. Ann. § 141.395 (Research Facilities Construction Credit); Ky. Rev. Stat. Ann. § 141.128 (Clean Coal Facility Credit).

business tax liability ranging from the building of day care facilities to the creation of jobs.[4] Ohio has, at minimum, fourteen location-based business tax credits, including the investment tax credit at issue in this case.[5]

Like incentives in all the other states, incentives offered by Ohio and the rest of the states in the Sixth Circuit share one feature in common: they require in-state activities by the taxpayer in order to benefit from the credit. For example, the Michigan single business tax credit for charitable contributions requires that the taxpayer give money to Michigan charities in order to qualify for the credit. *See* Mich. Comp. Laws § 208.38. Kentucky's unemployment tax credit allows a $100 credit for each unemployed person hired by the taxpayer, so long as the person is officially classified as unemployed by the state Department for Community Based Services. *See* Ky. Rev. Stat. Ann. § 141.062.

Political controversy does not surround all of the incentives offered by Sixth Circuit states, yet the Sixth Circuit's broad ruling would imperil them all. For example, Tennessee gives a tax credit for construction of a day care facility for employees, but only if the facility is licensed by the Tennessee Department of Human Services. *See* Tenn. Rev. Code § 67-4-2009(3)(A). This would naturally exclude Tennessee taxpayers who pay for day care facilities licensed by other states, in the same way that Ohio's investment tax credit withholds a benefit from Ohio taxpayers who

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[4] *See, e.g.*, Tenn. Code Ann. § 67-4-2009(4) (Industrial Machinery Credit); Tenn. Code Ann. § 67-4-2009(3) (Day Care Center Construction Credit); Tenn. Code Ann. § 67-4-2009(6) (Medical Supplies and Equipment Tax Credit); Tenn. Code Ann. § 67-4-2109(c)(2)(A) (Jobs Tax Credit).

[5] *See, e.g.*, Ohio Rev. Code Ann. § 5733.33 (Machinery and Equipment Investment Credit); Ohio Rev. Code Ann. § 122.15 (Edison Research and Development Credit); Ohio Rev. Code Ann. § 122.171 (Job Retention Credit); Ohio Rev. Code Ann. § 5733.42 (Employee Training Credit); Ohio Rev. Code Ann. § 122.658 (Brownfield Revitalization Fund Credit); Ohio Rev. Code Ann. § 5733.063 (Savings and Loan Credit); Ohio Rev. Code Ann. § 5733.064 (Recycling and Litter Prevention Donation Credit); Ohio Rev. Code Ann. § 5733.32 (Grape Producing Property Credit); Ohio Rev. Code Ann. § 5733.36 (Day Care Provision Credit); Ohio Rev. Code Ann. § 5733.37 (Day Care Center Credit); Ohio Rev. Code Ann. § 5733.38 (Day Care Reimbursement Credit); Ohio Rev. Code Ann. § 5733.43 (Maintenance of Active Grade Crossing Credit); Ohio Rev. Code Ann. § 5733.46 (Ethanol Plant Investment Credit); Ohio Rev. Code Ann. § 5733.49 (Venture Capital Fund Credit).

invest in machinery or equipment in other states. The Sixth Circuit's ruling would imperil the Tennessee day care tax credit and any other tax credit that seeks to encourage in-state investment (be it an auto plant or a day care center) by denying the credit for out-of-state investment. *See Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743 (6th Cir. 2004) ("the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.").

Meanwhile, outside the Sixth Circuit, such credits are not similarly compromised. This puts the states of the Sixth Circuit at a competitive disadvantage.

This Court should grant certiorari now to announce a single rule for all states. If nothing else, the Commerce Clause requires that all states compete under the same rules and restrictions.

## II. THIS COURT SHOULD GRANT CERTIORARI NOW TO CLARIFY ITS OWN STANDARDS FOR DISCRIMINATION UNDER THE COMMERCE CLAUSE.

This Court's own language in several of its opinions serves, in part, as the basis for the lawsuit in this case. In fact, certain statements made by this Court, if taken literally, could serve as the basis for even more lawsuits in the future. This Court's review of this case is needed to clarify the standards for discrimination under the Commerce Clause.

For example, this Court has said that state tax policy must be such that business decisions are made "solely on the basis of nontax criteria." *Boston Stock Exch.*, 429 U.S. at 331. This Court has also stated that a state cannot adopt a tax policy that "foreclose[s] tax-neutral decisions." *Id.* These statements, if taken literally, mean that a state cannot develop a tax policy that encourages growth and investment. Not even tax rate reductions or exemptions would be allowed under this literal language. *See* Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 802 (1995) ("literalistic focus on key passages in the Court's opinions might suggest that 'all state inducement programs are likely to be unconstitutional'").

But on the other hand, this Court has made equally sweeping, and seemingly contradictory, statements in its decisions. For example, this Court has written that its decisions should not be read to "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. This Court has written that a state may "enact laws pursuant to its police power that have the purpose and effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271. And this Court has written that a state "may try to attract business by creating an environment conducive to economic activity." *West Lynn Creamery*, 512 U.S. at 199 n. 15. These statements seem to endorse state tax measures that are designed to make a state more attractive to business. Yet these are exactly the types of provisions that the plaintiffs in this case are seeking to invalidate. *See* Enrich, *supra*, 110 HARV. L. REV at 387 (encouraging plaintiffs to sue to invalidate measures that "enhance a state's attractiveness as a place for business to locate their facilities and their jobs").

This Court should grant certiorari now. State legislators and corporate taxpayers in most states are eagerly awaiting this Court's guidance on a question of national importance that is at the very root of our federalist system of government: How much freedom do the states have to adopt their own tax policies? And once adopted, can taxpayers rely on the state tax laws?

### A. This Court Should Grant Certiorari Now to Clarify That Most Discrimination Challenges Under the Commerce Clause Must be Evaluated on a Fact-Sensitive, Case by Case Basis.

In *Boston Stock Exchange*, this Court explained that its Commerce Clause jurisprudence "turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exch.*, 429 U.S. at 329. Yet the Sixth Circuit, in striking down Ohio's investment tax credit, formulated an overly broad rule that cannot be limited to tax incentives. In ruling that Ohio's investment tax credit violated the Commerce Clause because it encouraged "further investment in-state at the expense of development in other states," the Sixth Circuit's rule would sweep in a host of tax reform measures and other development incentives. *Cuno*, 386 F.3d at 745. Indeed, all

state tax laws arguably have the potential to distort the decision-making process in some way. The Sixth Circuit's broad ruling is wholly inconsistent with this Court's admonition to adjudge discriminatory tax schemes on a narrow, ad hoc basis.

### B. This Court Should Grant Certiorari Now to Clarify That a State Does Not Violate the Commerce Clause Simply by Making its Tax Climate Attractive to Business.

This case presents a valuable opportunity to clarify the uncertainty generated by this Court's past decisions. The Sixth Circuit's ruling rests upon language, taken out of context, from prior Commerce Clause decisions written by this Court. The absence of clear guidance has allowed the plaintiffs to seize upon certain language to convince the Sixth Circuit to strike down a state tax policy with which plaintiffs disagree.

Consider this Court's admonition that state tax laws be written so that business decisions are based "solely on the basis of nontax criteria." *Boston Stock Exch.*, 429 U.S. at 331. This language cannot be taken literally. For example, states routinely reduce generally applicable tax rates and occasionally eliminate taxes. These routine actions would run afoul of this Court's "solely on the basis of nontax criteria" language. Indeed, if Ohio had enacted a general tax rate reduction and the resulting rate were lower than other competing states, a business may well decide to locate in Ohio "on the basis of" tax criteria. Literally speaking, the rate reduction would violate this Court's own standard.

Likewise, such routine state actions may run afoul of a literal reading of the Sixth Circuit's decision. If Ohio had reduced its generally applicable corporate income tax rate, and if petitioner had invested in another state, the income from the investment would have been apportioned to that other state. *See, e.g.*, Ohio Rev. Code § 5733.01 (levying corporate franchise tax for the "privilege of doing business" in state and "owning or using a part or all of its capital or property in this state"); *Wilkins v. Cuno*, Pet. for Cert., (Supreme Court Case No. 04-1724) at 9 ("If an interstate business elects to locate new manufacturing machinery and equipment *outside* Ohio, its Ohio percentage will decrease."). Thus, under a regime of lower tax rates, instead of investment tax

credits, DaimlerChrysler would still have only been able to "reduce its existing tax liability by locating significant new machinery and equipment within the state" because it would not receive a similar reduction "in tax liability if it [located] a comparable plant and equipment elsewhere." *Cuno*, 386 F.3d at 743. Again, that cannot be the standard, yet that is what the opinion says.

Because of the potentially sweeping effect of these standards, many other state tax policy decisions are imperiled, especially in the Sixth Circuit. For example, Kentucky enacted a comprehensive tax reform plan this year, designed to spur in-state investment and provide a more business-friendly climate. *See* H.B. 272, 2005 Leg., Reg. Sess. (Ky. 2005). Ohio enacted a similar plan, swapping its corporate franchise tax for a gross receipts tax in an effort to further enhance in-state investment. *See* H.B. 66, 126th Gen. Assem., Reg. Sess. (Oh. 2005). Michigan is currently embroiled in debate over its Single Business Tax, with both sides advocating reductions or elimination to spur the state's lagging employment market. *See, e.g.*, Michigan Dept. Treasury, *Governor Granholm's Single Business Tax Plan Introduced*, (Mar. 8, 2005), *available at* http://www.michigantaxfairness.com/media clips/GovernorGranholmIntroduced.pdf ("Governor Jennifer M. Granholm...called passage of her Single Business Tax reform package critical to retaining and creating more jobs in Michigan."). Under the Sixth Circuit's ruling in *Cuno*, and even under this Court's own language in certain decisions, these measures are now suspect because they may succeed in their objective of encouraging in-state investment.

Furthermore, such a sweeping interpretation of the Commerce Clause is in tension with this Court's past support for similar types of state tax incentives. In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), this Court upheld against a Commerce Clause challenge a state's right to attract investment using single sales apportionment (SSA). SSA gives businesses a powerful incentive to locate new investment in the SSA state, since property and payroll no longer matter for income apportionment purposes. Thus, a business can invest in unlimited property and payroll and still apportion income based solely on in-state sales. Fourteen states have, or are steadily moving towards, single-sales apportionment for all or some taxpayers (compared to one state—Iowa—when the Supreme

Court decided the *Moorman* case).[6] Six states weight sales at least fifty percent or higher in their apportionment formulas.[7] This year, bills were introduced in five more states (including Michigan)[8] and enacted in four states[9] to move to full or modified single sales apportionment.

The *Moorman* case was decided on the fair apportionment prong of *Complete Auto*, however the dissent would have invalidated SSA on discrimination grounds. *See Moorman*, 437 U.S. at 289 ("application of Iowa's single-factor sales-apportionment formula, in the context of general use of three-factor formulae, inevitably handicaps out-of-state businesses competing for sales in Iowa.") (Powell, J., dissenting). If Ohio's investment tax credit, as the Sixth Circuit ruled, discriminates

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[6] *See, e.g.*, Conn. Gen. Stat. § 12-218(k)-(l) (provides single sales apportionment for manufacturers and broadcasters); H.B. 191, 148th Gen. Assem., Reg. Sess. (Ga. 2005) (phasing into a single sales factor apportionment in 2008); 810 Ill. Comp. Stat. 5/304(h); Iowa Code § 422.33(2)(b)(3) (provides single sales apportionment for the manufacture and sales of tangible personal property); H.B. 679, 2005 Reg. Sess. (La. 2005) (weighting sales at 100% as of 1/1/2006); Md. Code Ann. Tax-Gen. § 10-402(c)(2) (single sales factor for manufacturers); Mass. Ann. Laws ch. 63, § 38(k)(5) (single sales factor for manufacturers, defense contractors and mutual funds); Mo. Rev. Stat. § 143.451.2(2)(b) (companies may choose an evenly weighed or single formula); Neb. Rev. Stat. § 77-2734.05(1); N.Y. Tax Law § 210 (phasing into a single factor sales apportionment by 2008); Or. Rev. Stat. § 314-650 (phasing in a single sales apportionment by July 2008); S.C. Code Ann. § 12-6-2240 (a single factor gross receipts formula applied to service related industries); Tex. Tax Code Ann. § 141.001; Wis. Stat. § 71.04 – 71.45 (phasing in a single sales factor by 2008).

[7] *See, e.g.*, Ariz. Rev. Stat. Ann. § 43-1139 (phasing in a 60% sales factor in 2007, 70% in 2008 and 80% in 2009, as amended by H.B. 2139); Mich. Comp. Laws § 208.45a (weighting sales at 90%); Minn. Stat. § 290.191 (weighting sales at 75%); Ohio Rev. Code § 5733.05(B)(2) (weighting sales at 60%); Or. Rev. Stat. § 314.650 (weighting sales at 80%); Pa. Stat. Ann. tit. 72, § 7401(9) (weighting sales at 60%)

[8] *See, e.g.*, H.B. 2139, 47th Leg., 1st Reg. Sess. (Ariz. 2005) (proposed 100% sales apportionment by 2010, amended to apportion at 80% by 2009); H.B. 679, 2005 Reg. Sess. (La. 2005); H.B. 4973, 93rd Leg., 1st Reg. Sess. (Mich.) (proposing a single sales factor apportionment); S.B. 753, 84th Reg. Sess. (Minn.); H.B. 660, 84th Reg. Sess. (Minn.) (both bills proposing a 3% increase in sales factor apportionment until 100% is reached in 2014); H.B. 515, 189th Gen. Assem., Reg. Sess. (Pa.) (passed the House on May 10, 2005, applying a single sales factor apportionment to sales made in the state.)

[9] Arizona, Georgia, Louisiana and New York enacted their single factor or modified apportionment laws in 2005. See *supra*, notes 6 - 8.

against interstate commerce by discouraging out-of-state investment, SSA would also likely be guilty of the same discrimination. Indeed, the plaintiffs' lawyer sees it just this way. Enrich, *supra*, 110 HARV. L. REV. at 462 ("income tax apportionment methods that give special weight to the sales factor demand close scrutiny, notwithstanding the Court's 1978 decision.").

Indeed, single sales apportionment's impact on business investment will be qualitatively indistinguishable from Ohio's investment tax credit: they both work to reduce taxable income with respect to in-state investments in physical capital. Thus, the Sixth Circuit's broad ruling creates a tension with this Court's ruling in *Moorman* and leaves SSA susceptible to Commerce Clause challenge in the Sixth Circuit and in other states that follow its reasoning. *See* Sylvia Dennen & Christopher Whitney, *Single Factor—Multiple Questions*, 2005 STATE TAX NOTES TODAY 19-2, Jan. 12, 2005 ("[i]t would appear that [Pennsylvania's single sales factor legislation] has quite a bit in common with the investment tax credits found to be unconstitutionally discriminatory ... in *Cuno*").

This Court's guidance is needed to clarify that these kinds of state tax policy decisions are, in fact, not objectionable.

## III. THIS COURT SHOULD GRANT CERTIORARI NOW TO CLARIFY AN IMPORTANT POINT: THE COMMERCE CLAUSE DOES NOT REQUIRE A STATE TO BE MORE GENEROUS TO INVESTMENTS FROM "NEW" TAXPAYERS THAN INVESTMENTS FROM "OLD" TAXPAYERS.

The Sixth Circuit upheld Ohio's personal property tax exemption even while striking down Ohio's investment tax credit. The Sixth Circuit distinguished the exemption from the credit, holding that "[u]nlike an investment tax credit that reduces pre-existing income tax liability, the personal property exemption does not reduce any existing property tax liability." *Cuno*, 386 F.3d at 747. Thus, according to the Sixth Circuit, Ohio's personal property tax credit did not discriminate "against interstate commerce by coercing businesses already subject to ... Ohio ... tax to expand locally instead of out-of-state." *Id.* at 743.

This "pre-existing liability" formulation is regrettable. If taken literally, it suggests that a taxpayer who had no connection (or "nexus") with Ohio and moved into Ohio and who, in connection with its move into Ohio qualified for the investment tax credit, could keep the investment tax credit because the investment tax credit would not reduce any "pre-existing liability." Yet a taxpayer who already had nexus with Ohio and who qualified for the investment tax credit could not keep it because it would unconstitutionally reduce a "pre-existing liability."

Certainly this cannot be right. This Court has consistently interpreted the Commerce Clause to require fair and equal treatment of intrastate and interstate commerce: "A cardinal rule of Commerce Clause jurisprudence is that [no] State...may impose a tax which discriminates against interstate commerce...by providing a direct commercial advantage to local business." *Bacchus*, 486 U.S. at 268 (internal quotations omitted). Though the Commerce Clause forbids discriminatory treatment of out-of-state taxpayers, this Court has never interpreted it to require that states treat investment flowing into or out of a state more favorably than purely in-state investment.

> [T]he Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business ... [w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a "burden" on interstate commerce.

*Hughes*, 426 U.S. at 815–816 (Stevens, J., concurring).

The Sixth Circuit's decision would reverse course and require states to give more favorable tax treatment to investment flowing from out-of-state sources, without pre-existing tax liability, than investment flowing from in-state sources with preexisting liability. *See* Edward A. Zelinsky, *Cuno v. DaimlerChrysler: A Critique*, 2004 STATE TAX NOTES TODAY 192-2 (Oct. 4, 2004) ("Why should the Commerce Clause deny DaimlerChrysler an Ohio investment tax credit because of its old Ohio plant while the clause permits a credit for new investment to an otherwise identical competitor without an extant facility in Ohio?"). If Ohio's investment tax credit discriminates because it is more likely to induce Ohio businesses with "pre-existing" liability to invest in

Ohio as opposed to another state, then surely there is no constitutional infirmity if a business with no pre-existing tax liability invests in Ohio and takes the credit. The Sixth Circuit's ruling would require a state to discriminate *against* investment from resident sources in favor of out-of-state investment, a result that cannot be squared with this Court's insistence that the Commerce Clause requires neutrality between intrastate and interstate commerce.

This "pre-existing" formulation is particularly unhelpful with regard to transaction taxes, like the one at issue in *Boston Stock Exchange*. *Boston Stock Exch.*, 429 U.S. at 319. In that case, a reduced tax rate on securities transferred in New York was contingent on the taxpayer making the security sale there. That incentive was held unconstitutional But under the Sixth Circuit's "pre-existing liability" formulation, would New York's incentive still be unconstitutional—insofar as it encouraged taxpayers that did not transfer *or* sell securities in New York (i.e., had no "pre-existing" liability) to move both of those operations into New York and thereafter both transfer and sell securities there? Certainly this is not within this Court's reasoning in *Boston Stock Exchange*.

Yet, despite the fact that it is not a workable legal standard, the "pre-existing" formula will be the law in the Sixth Circuit unless this Court reviews this case. Further still, other jurisdictions may adopt this unworkable standard: The "pre-existing liability" shorthand has been used by commentators as a way of analyzing tax schemes for discrimination. *See, e.g.*, Heilerstein & Coenen, *supra*, 81 CORNELL L. REV. at 807 ("those ... incentives framed not as exemptions from ... *existing* state tax liability [are acceptable]"). It is likely, therefore, that without this Court's guidance, many legislators will try to incorporate the unworkable "pre-existing liability" standard into their tax schemes and many state courts will use this standard to analyze the constitutionality of state taxes.

Accordingly, this Court's guidance is needed now to avoid the effects of such an unworkable standard.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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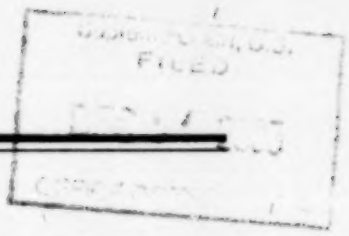
04-1704 & 04-1724



IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
*Petitioner,*

v.

CHARLOTTE CUNO, ET AL.,
*Respondents.*

WILLIAM W. WILKINS, TAX COMMISSIONER, ET AL.,
*Petitioners,*

v.

CHARLOTTE CUNO, ET AL.,
*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Sixth Circuit**

## JOINT APPENDIX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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari of DaimlerChrysler Corporation in *DaimlerChrysler Corp. v. Cuno*, No. 04-1704:

Memorandum Opinion of the United States District Court for the Northern District of Ohio, (Aug. 1, 2001).....18a

Opinion of the United States Court of Appeals for the Sixth Circuit, (Oct. 19, 2004).....1a

Order of the United States Court of Appeals for the Sixth Circuit, denying petitions for rehearing, (Jan. 18, 2005).....31a

**Relevant Docket Entries in the U.S. Court of Appeals for the Sixth Circuit, Case No. 01-3960,**
***Cuno, et al. v. DaimlerChrysler, Inc., et al.***

| | |
|---|---|
| 9/12/01 | Civil Case Docketed. Notice filed by T. Lodge and P. Enrich for Appellants Charlotte Cuno, et al. Transcript needed: n (There are 18 plaintiffs listed in the noa. Complete list of names can be found in the office file) □ (bb) |
| | * * * |
| 11/9/01 | PROOF BRIEF filed by Terry J. Lodge for Appellant Charlotte Cuno. Certificate of service date 11/5/01. Number of Pages: 59. [01-3960] □ (vf) |
| | * * * |
| 12/6/01 | PROOF BRIEF filed by Robert C. Maier for Appellee State of Ohio, Appellee C. Lee Johnson, Appellee Thomas M. Zaino, Appellee Joseph T. Deters, Sharon A. Jennings for Appellee State of Ohio, Appellee C. Lee Johnson, Appellee Thomas M. Zaino, Appellee Joseph T. Deters, Samuel J. Nugent for Appellee City of Toledo, Appellee Carleton S. Finkbeiner, Barbara E. Herring for Appellee City of Toledo, Appellee Carleton S. Finkbeiner, Truman A. Greenwood for Appellee Washington Local, Appellee Toledo Pub School, Theodore M. Rowen for Appellee Washington Local, Appellee Toledo Pub School. Certificate of service date 12/5/01. Number of Pages: 55. [01-3960] □ (vf) |
| | * * * |

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|---|---|
| 12/6/01 | PROOF BRIEF filed by Charles A. Rothfeld, Albin Bauer, and John T. Landwehr for Appellee DaimlerChrysler, Inc. Certificate of service date 12/5/01. Number of Pages: 53. [01-3960] □ (vf) |
| | * * * |
| 12/21/01 | PROOF REPLY BRIEF filed by Terry J. Lodge for Appellant Charlotte Cuno. Certificate of service date 12/19/01. Final reply brief due 1/24/02 . [01-3960] (vf) |
| | * * * |
| 2/4/03 | CAUSE ARGUED on 2/4/03 by Peter D. Enrich for Appellant Charlotte Cuno, Charles A. Rothfeld for Appellee DaimlerChrysler, Inc, Sharon A. Jennings for Appellee Joseph T. Deters, Appellee Thomas M. Zaino, Appellee C. Lee Johnson, Appellee OH before Judges Siler, Daughtrey, Cole. [01-3960] (me) |
| 9/2/04 | OPINION filed: AFFIRMED in part and REVERSED in part [01-3960], decision for publication pursuant to local rule 206 [01-3960]. Eugene E. Siler, Circuit Judge, Martha C. Daughtrey, Authoring Circuit Judge, R. G. Cole, Circuit Judge. (bb) |
| 9/2/04 | JUDGMENT: AFFIRMED in part and REVERSED in part. (bb) |
| 9/16/04 | PETITION for en banc rehearing filed by Theodore M. Rowen for Appellees Toledo Pub School, Washington Local, Samuel J. Nugent for Appellees Carleton S. Finkbeiner, City of Toledo. Certificate of service date 9/16/04. [01-3960] (blh) |
| | * * * |

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|---|---|
| 9/16/04 | ADDITIONAL PETITION for en banc rehearing filed by Douglas R. Cole for Appellees Joseph T. Deters, Thomas M. Zaino, C. Lee Johnson, OH. Certificate of service date 9/16/04. [01-3960] (blh) |
| 9/16/04 | ADDITIONAL PETITION for en banc rehearing filed by Charles A. Rothfeld for Appellee DaimlerChrysler, Inc. Certificate of service date 9/16/04. [01-3960] (blh) |
| | * * * |
| 10/19/04 | AMENDED OPINION filed: AFFIRMED in part and REVERSED in part. REVERSED that portion of the district court's judgment upholding as constitutional the investment tax credit provision of Ohio Rev. Code Ann. § 5733.33, and enjoin its enforcement. AFFIRMED the remaining portions of the district court's judgment [01-3960], decision for publication pursuant to local rule 206 [01-3960] . Eugene E. Siler, Circuit Judge, Martha C. Daughtrey, Authoring Judge, R. G. Cole, Circuit Judge. (bb) |
| 10/19/04 | JUDGMENT: AFFIRMED in part and REVERSED in part . (bb) |
| | * * * |
| 10/29/04 | MEMORANDUM OF LAW filed in support of their petition for rehearing en banc. Filed by Douglas R. Cole for Appellees Joseph T. Deters, Thomas M. Zaino, C. Lee Johnson, OH. Certificate of service date 10/29/04. [01-3960] (blh) |

| | |
|---|---|
| 10/29/04 | MEMORANDUM OF LAW in support of their petition for rehearing en banc. Filed by Samuel J. Nugent for Appellees Carleton S. Finkbeiner, City of Toledo. Certificate of service date 10/29/04. [01-3960] (blh) |
| 11/2/04 | MEMORANDUM OF LAW in support of its petition for rehearing en banc. Filed by Charles A. Rothfeld for Appellee Daimler-Chrysler, Inc. Certificate of service date 11/2/04. [01-3960] (blh) |

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|---|---|
| 11/18/04 | RESPONSE to the petitions for en banc rehearing [3023966-1] filed by Theodore M. Rowen and Samuel J. Nugent, [3024088-1] Douglas R. Cole, [3024093-1] and Charles A. Rothfeld. Response filed by Terry J. Lodge for Appellant Charlotte Cuno. Certificate of service date 11/17/04. [01-3960] (blh) |
| 1/18/05 | ORDER filed denying petitions for en banc rehearing [3023966-1] filed by Theodore M. Rowen and Samuel J. Nugent [3024088-1] filed by Douglas R. Cole, and [3024093-1] filed by Charles A. Rothfeld [01-3960]. Eugene E. Siler, Martha C. Daughtrey, R. G. Cole, Circuit Judges. (blh) |
| 1/24/05 | Appellee MOTION filed to stay mandate pending certiorari. Motion filed by Douglas R. Cole for Appellee Joseph T. Deters, Appellee Joseph T. Deters, Appellee Thomas M. Zaino, Appellee Thomas M. Zaino, Appellee C. Lee Johnson, Appellee C. Lee Johnson, Appellee OH, Appellee OH. Certificate of service date 1/24/05. [01-3960] (nb) |

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|---|---|
| 1/25/05 | Appellee MOTION filed to stay mandate pending certiorari. Motion filed by Theodore M. Rowen for Appellee Toledo Pub School, Appellee Washington Local, Samuel J. Nugent for Appellee Carleton S. Finkbeiner, Appellee City of Toledo. Certificate of service date 1/25/05 . [01-3960] (nb) |
| 1/25/05 | Appellee MOTION filed to stay mandate pending certiorari. Motion filed by Charles A. Rothfeld for Appellee DaimlerChrysler, Inc. Certificate of service date 1/25/05. [01-3960] (nb) |
| 1/31/05 | ORDER filed granting motion to stay mandate to allow time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case. [01-3960] . . Eugene E. Siler, Circuit Judge, Martha C. Daughtrey, Circuit Judge, R. G. Cole, Circuit Judge. (nb) |

* * *

**Relevant Docket Entries in the U.S. District Court for the Northern District of Ohio, Case No. 3:00-cv-07247, *Cuno, et al. v. DaimlerChrysler, Inc., et al.***

| Date Filed | # | Docket Text |
|---|---|---|
| 04/20/2000 | 1 | Notice of Removal *with jury demand.* filed by Truman A. Greenwood, Barbara E. Herring, John T Landwehr, Theodore M Rowen of Spengler Nathanson P.L.L. on behalf of DaimlerChrysler, Inc., Joseph T. Deters, Carleton S. Finkbeiner, Terry L. Glazer, David Hunter, C. Lee Johnson, State of Ohio, Toledo Public School District, Toledo, City of, Washington Local School District, Thomas M. Zaino. Filing fee collected, receipt #309015. (Attachments: # 1) (N, D) (Entered: 07/11/2000) |
| | | * * * |
| 05/11/2000 | 6 | Removal Order: US District Court assumes jurisdiction of Case No. CIO2000002084 from Lucas County Common Pleas Court. (N, D) (Entered: 07/12/2000) |
| | | * * * |
| 06/12/2000 | 18 | Supplemental Motion to remand case *to state court or alternatively for abstention and remand* filed by Peter D. Enrich, Terry J. Lodge of Northeastern University School of Law on behalf of all plaintiffs. (N, D) (Entered: 07/12/2000) |

| Date Filed | # | Docket Text |
|---|---|---|
| | | * * * |
| 07/17/2000 | 30 | Opposition to *Plaintiffs' Motion to Remand* filed by John T Landwehr of Eastman & Smith on behalf of DaimlerChrysler, Inc., City of Toledo, Carlton Finkbeiner, Toledo Public School District, Terry L. Glazer, Washington School District & David Hunter. (Related motion(s) 12, 18) (Other related filing(s) 18, 12) (Landwehr, John) Modified on 7/17/2000 (H, D). (Entered: 07/17/2000) |
| 07/17/2000 | 31 | Opposition to plaintiffs' motion to remand filed by Sharon A. Jennings of Office Of The Attorney General on behalf of Joseph T. Deters, C. Lee Johnson, State of Ohio, Thomas M. Zaino. (Related motion(s) 18) (Jennings, Sharon) Modified on 7/18/2000 (N, D). (Entered: 07/17/2000) |
| | | * * * |
| 08/01/2000 | 35 | Reply *in Support of Supplemental Motion to Remand* filed by Terry J. Lodge on behalf of all plaintiffs. (Related motion(s) 12, 18) (Other related filing(s) 31, 30) (Lodge, Terry) (Entered: 08/01/2000) |
| | | * * * |

| Date Filed | # | Docket Text |
|---|---|---|
| 08/09/2000 | 36 | Motion for leave to file *Defendants' Surreply Memorandum in Opposition to Plaintiffs' Motion for Remand* (related document(s)18, 12) filed by Robert J. Gilmer Jr., Truman A. Greenwood, Barbara E. Herring, Sharon A. Jennings, Erika Z. Jones, Miriam R. Nemetz, Samuel J. Nugent, Charles A. Rothfeld, Theodore M Rowen, John T Landwehr of Eastman & Smith on behalf of all defendants. (Attachments: # 1 Proposed Order # 2 Surreply Memorandum in Opposition to Plaintiffs' Motion to Remand # 3 Memorandum in Support of Motion for Leave) (Landwehr, John) (Entered: 08/09/2000) |
| 08/15/2000 | 37 | Order Granting Motion for leave to file surreply. (Related Doc # 36) (Katz, David) (Entered: 08/15/2000) |
| 08/15/2000 | 38 | Sur-Reply memorandum in *opposition* to Plaintiffs' motion for remand filed by John T Landwehr of Eastman & Smith on behalf of all defendants. (Related motion(s) 12, 18) (Katz, David) (Entered: 08/15/2000) |
| | | * * * |
| 11/20/2000 | 44 | Memorandum Opinion denying motion to remand case (Related Doc #18), denying motion to remand case (Related Doc # 12), granting Motion to amend complaint. (Related Doc # 25) (Katz, David) (Entered: 11/20/2000) |

| Date Filed | # | Docket Text |
|---|---|---|
| 11/20/2000 | 45 | Judgment plaintiffs motion to remand (Doc. 12) and *Plaintiffs supplemental* motion to remand (Doc. 18) denied; Plaintiffs motion to amend the complaint (Doc. 25) granted. (Katz, David) (Entered: 11/20/2000) |
| | | * * * |
| 02/12/2001 | 51 | Motion to dismiss case *Motion to Dismiss the Complaint Pursuant to Rule 12(B)(6)* filed by John T Landwehr of Eastman & Smith on behalf of DaimlerChrysler, Inc..(Landwehr, John) (*Entered*: 02/12/2001) |
| 02/12/2001 | 52 | Motion to dismiss case filed by Truman A. Greenwood, Barbara E. Herring, Robert C. Maier, Samuel J. Nugent, Theodore M Rowen, Sharon A. Jennings of Spengler Nathanson P.L.L. on behalf of Joseph T. Deters, Carleton S. Finkbeiner, C. Lee Johnson, State of Ohio, Toledo Public School District, Toledo, City of, Washington Local School District, Thomas M. Zaino. (Jennings, Sharon) (Entered: 02/12/2001) |
| | | * * * |
| 04/03/2001 | 55 | Response in *Opposition to All Defendants' Motions to Dismiss Re Inapplicability of Commerce Clause* filed by Terry J. Lodge on *behalf* of all plaintiffs. (Related motion(s) 51, 52) (Other related filing(s) 51, 52) (Lodge, Terry) (Entered: 04/03/2001) |

| Date Filed | # | Docket Text |
|---|---|---|
| 04/03/2001 | 56 | Opposition to *All Defendants' Motions to Dismiss (Re Eleventh Amendment Immunity and Equal Protection)* filed by Terry J. Lodge on behalf of all plaintiffs. (Related motion(s) 51, 52) (Other related filing(s)51, 52) (Lodge, Terry) (Entered: 04/03/2001) |
| 04/04/2001 | 57 | Opposition Memorandum to *All Defendants' Motions to Dismiss Re Inapplicability of Commerce Clause* filed by Terry J. Lodge on *behalf* of all plaintiffs. (Related motion(s) 51, 52) (Other related filing(s) 51, 52) (Lodge, Terry) (Entered: 04/04/2001) |
| 04/24/2001 | 58 | Reply Memorandum of *Law in Support of Defendant Daimler Chrysler Corporation's Motion to Dismiss the Complaint Pursuant to Rule 12(B)(6)* filed by DaimlerChrysler, Inc.. (Related motion(s) 51) (Landwehr, John) Modified on 4/24/2001 (N, D). INCOMPLETE DOCUMENT, TO BE REFILED (Entered: 04/24/2001) |
| 04/24/2001 | 59 | Reply *Memorandum of Law in Support of Defendant Daimler Chrysler Corporation's Motion to Dismiss the Complaint Pursuant to Rule 12(B)(6)* filed by DaimlerChrysler, Inc.. (Related motion(s) 51) (Landwehr, John) (Entered: 04/24/2001) |

| Date Filed | # | Docket Text |
|---|---|---|
| 04/24/2001 | 60 | Reply *in Support of Defendants' Motion to Dismiss* filed by Joseph T. Deters, Carleton S. Finkbeiner, C. Lee Johnson, State of Ohio, Toledo Public School District, Toledo, City of, Washington Local School District, Thomas M. Zaino. (Related motion(s) 52) (Other related filing(s) 57, 56) (Jennings, Sharon) (Entered: 04/24/2001) |
| 08/01/2001 | 61 | MEMORANDUM OPINION granting defendants' motions to dismiss case. (Related Doc # 51) (Related *Doc* # 52) (Katz, David) Modified on 8/3/2001 (N, D). (Entered: 08/01/2001) |
| 08/01/2001 | 62 | JUDGMENT ENTRY. Defendants' motions to dismiss granted. Counts II& V dismissed without *prejudice* as to Commissioner of Ohio Department of Taxation, Director of Department of Development of State of Ohio and State of Ohio; Counts II & V dismissed with prejudice as to Ohio State Treasurer, Mayor of Toledo, City of Toledo, Toledo Public School District, Washington Local School District & Daimler Chrysler, Counts I, III, IV dismissed with prejudice as to all Defendants. (Katz, David) (Entered: 08/01/2001) |
| 08/30/2001 | 63 | Notice of Appeal regarding orders filed 8/01/01 61 and 62, filed by all plaintiffs. Filing fee paid; receipt number 312159 (M, C). Modified on 9/24/2004 (H, S P). (Entered: 09/06/2001) |

| Date Filed | # | Docket Text |
|---|---|---|
| | | * * * |
| 09/13/2004 | 65 | Information copy of opinion from the USCA for the Sixth Circuit: *Reversing* that portion of the District Court's judgment upholding as constitutional the investment tax credit provision of Ohio Rev. Code Ann. 5733.33 and we enjoin its enforcement. Affirming the remaining portions of the District Court's judgment as to 63 Notice of Appeal (USCA# 01-3960). This is not a mandate order. Circuit Judges: Siler, Daughtrey and Cole. Date issued by USCA 9/2/04 (Attachments: #(1) Judgment) (H, S P) (Entered: 09/16/2004) |
| 10/22/2004 | 66 | Information copy of Amended Opinion from the USCA for the Sixth Circuit: Reversing in part and Affirming in party the judgment of *the District* Court as to 63 Notice of Appeal (USCA# 01-3960). This is not a mandate order. Circuit Judges: Siler, Daughtrey and Cole. Date issued by USCA 10/19/04 (Related document 65) (Attachments: # I Amended Judgment) (H, S P) (Entered: 10/22/2004) |

| Date Filed | # | Docket Text |
|---|---|---|
| 02/02/2005 | 67 | Appeal Remark from the 6th Circuit Court of Appeals: The mandate is stayed to allow time to file a petition for a writ of certiorari in the Supreme Court re 63 Notice of Appeal (USCA# 01-3960). Circuit Judges: Siler, Daughtrey and Cole. Date issued by USCA 1/31/05 (H, SP) (Entered: 02/03/2005) |

* * *

**IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO**

| | | |
|---|---|---|
| Charlotte I. Cuno<br>5048 Tappan<br>Toledo, OH 43612<br>and<br>Mary L. Branwen<br>6608 Dorr Street<br>Toledo, OH 43615<br>and<br>Judith A. Pfaff<br>P.O. Box 27<br>Toledo, OH 43697-0027<br>and<br>Kenneth P. Pfaff<br>P.O. Box 27<br>Toledo, OH 43697-0027<br>and<br>Phoenix Earth Food Co-op, Inc.<br>1447 Sylvania Ave.<br>Toledo, OH 43612<br>and<br>Robert Scott Brundage<br>2532 Glenwood Ave.<br>Toledo, OH 43610<br>and<br>Herbert H. Raschke<br>4807 291st St.<br>Toledo, OH 43611-2127<br>and<br>Carol A. Raschke<br>4807 291st St.<br>Toledo, OH 43611-2127<br>and | ) | Case No. CI0200062004<br><br>Judge Skow<br><br>**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** |
| | | Terry J. Lodge<br>(0029271)<br>316 N. Michigan St.<br>Ste. 520<br>Toledo, OH 43624-1627<br>(419) 255-7552<br>Fax: (419) 255-8582<br><br>Peter D. Enrich, Esq.<br>Northeastern University School of Law<br>400 Huntington Ave.<br>Boston, MA 02115<br>(617) 373-5094<br><br>Counsel for Plaintiffs |

Hutton Pharmacy, Inc.
2101 Dorr St. )
Toledo, OH 43607
and )
Duane M. Arquette
331 Langdon St. )
Toledo, OH 43609
and )
Kim's Auto and Truck
Service, Inc. )
3708 Stickney Ave.
Toledo, OH 43612 )
and
Mary Ebright )
2062 Keen St.
Toledo, OH 43611 )
and
Helen Czapczynski )
2107 Keen St.
Toledo, OH 43611 )
and
Julie Coyle )
2554 Westbrook
Toledo, OH 43613 )
and
Jean E. Kaczmarek )
4441 Helmond Ct.
Toledo, OH 43611 )
and
Kathleen Hawkins )
953 Dixie Ave.
Erie, MI 48133 )
and
Carrie Hawkins )
953 Dixie Ave.
Erie, MI 48133 )
and

Rick Van Landingham
1312 Paxton St.
Toledo, OH 43608,

Plaintiffs,

-vs-

DaimlerChrysler, Inc.
Attn: Frederick Hoffman
Government Affairs
1000 Chrysler Drive
CIMS 485-09-82
Auburn Hills, MI
48326-2766
and
Terry L. Glazer
President of the Board
Toledo Public School
District
420 East Manhattan Blvd.
Toledo, OH 43608
and
Toledo Public School
District
420 East Manhattan Blvd.
Toledo, OH 43608
and
David Hunter
President of the Board
Washington Local School
District
3505 W. Lincolnshire Blvd.
Toledo, OH 43606
and

Washington Local School District )
3505 W. Lincolnshire Blvd.
Toledo, OH 43606 )
and
Carleton Finkbeiner, Mayor )
City of Toledo
One Government Center, )
22nd Floor
Toledo, OH 43604 )
and
City of Toledo )
One Government Center,
22nd Floor )
Toledo, OH 43604
and )
Joseph T. Deters
Treasure of State )
30 East Broad St.
Columbus, OH 43266 )
and
Thomas M. Zaino )
Tax Commissioner
Ohio Department of )
Taxation
30 East Broad St. )
P.O. Box 530
Columbus, OH 43266-0530 )
and
C. Lee Johnson, Director )
Department of
Development )
State of Ohio
77 S. High St. )
P.O. Box 1001
Columbus, Ohio 43216-1001 )
and

State of Ohio )
c/o Robert Taft,
Governor )
Statehouse
Columbus, OH 43215, )

Defendants. )

## INTRODUCTION

1. This lawsuit is brought to challenge the legality of certain tax benefits granted a private sector industrial corporation to induce it to keep some of its business operations in Toledo, Lucas County, Ohio.

2. Plaintiffs Charlotte I. Cuno, Mary L. Branwen, Judith A. Pfaff, Kenneth P. Pfaff, Robert Scott Brundage, Herbert H. Raschke, Carol A. Raschke, Duane M. Arquette, Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek and Rick Van Landingham are all residents of the City of Toledo, Lucas County, Ohio and as such are property owners and/or renters and pay property, sales and/or income taxes to the City of Toledo, Lucas County and the State of Ohio. Plaintiffs Mary Ebright, Helen Czapczynski, and Jean E. Kaczmarek all formerly resided within the development zone of DaimlerChrysler, Inc.'s Jeep plant project which is described further herein, and all three of said Plaintiffs were displaced from the homes they owned and/or resided in as a result of the use, or threatened use, of the eminent domain power by the City of Toledo to obtain title to their land in order to convey it to DaimlerChrysler Corporation for the Jeep plant project.

3. Plaintiffs Kathleen Hawkins and Carrie Hawkins (the "Michigan Plaintiffs") are residents of the State of Michigan, and they pay various taxes to the State of Michigan. Plaintiff Kathleen Hawkins owns residential real property in Michigan and pays property taxes thereon.

4. Plaintiff Phoenix Earth Food Co-op, Inc. is a not-for-profit corporation under the laws of the State of Ohio the purpose of which is to operate a food sales cooperative in the City of Toledo. The Co-op pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

5. Plaintiff Hutton Pharmacy, Inc. is a for-profit corporation under the laws of the State of Ohio which operates a drug store and pharmacy business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

6. Plaintiff Kim's Auto and Truck Service, Inc. is a for-profit corporation under the laws of the State of Ohio which operates an automotive mechanical repair business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio. Said Plaintiff's business is, as of the time of filing of this Complaint, located within the boundaries of the Jeep plant project. This Plaintiff's real estate is currently facing the invocation, or threatened invocation, of the power of eminent domain by the City of Toledo in order for the land on which it is located at 3708 Stickney Avenue, Toledo to be conveyed to Defendant DaimlerChrysler, Inc. as part of the Jeep plant project. The Plaintiffs enumerated in ¶¶ 2, 4, 5 and 6 herein are collectively referred to as the "Ohio Plaintiffs."

7. Defendant DaimlerChrysler, Inc. is a for-profit corporation, the North American headquarters of which is located in Auburn Hills, Michigan, which has operated a manufacturing plant on Stickney Avenue in Toledo for the construction of Jeep motor vehicles or parts for same for many years. The Stickney Avenue plant is the focus of physical expansion and technology upgrading in order for the manufacture of motor vehicles to continue into the future. The Stickney Avenue plant expansion will cost an estimated $1,200,000,000. The City of Toledo, Toledo Public Schools, Washington Local Schools and the State of Ohio have amassed a package of

governmental incentives, currently totalling at least $281,000,000, which have been granted, accorded, guaranteed, provided or otherwise made available to DaimlerChrysler as inducements for the expansion and continued operation of the Stickney Avenue Jeep plant.

8. Defendants Toledo Public Schools and Washington Local Schools are public school districts which are capable of being sued. Defendant Terry L. Glazer is President of the Toledo Public School Board and is being sued in his official capacity. Defendant David Hunter is President of the Washington Local Public School Board and is being sued in his official capacity. Portions of the Stickney Avenue Jeep plant are located in the two school districts, and the school districts ordinarily receive property tax revenues based upon their respective shares of the real and personal property at the plant. Defendants Presidents of the boards of the Defendant school districts have authorized the granting of tax incentives to DaimlerChrysler as inducements to expand the Stickney Avenue plant in Toledo.

9. Defendant Carleton Finkbeiner is Mayor of the City of Toledo, Ohio and in such capacity has authorized the granting of tax incentives related to the Toledo Jeep plant to Defendant DaimlerChrysler. Defendant City of Toledo is a municipal general purpose government under the laws of the State of Ohio, and is capable of being sued, and is being sued, for granting said incentives to Defendant DaimlerChrysler.

10. Defendant Joseph T. Deters is Treasurer of the State of Ohio and is charged with the collection of tangible personal property tax and corporate franchise tax revenues.

11. Defendant Thomas M. Zaino is Commissioner of the Ohio Department of Taxation and is responsible for enforcement of state tax codes, including those for the tangible personal property tax and corporate franchise tax.

12. Defendant C. Lee Johnson is the Director of the Ohio Department of Development and is responsible for the necessary certification of enterprise zones to allow the granting of tangible personal property tax abatement.

13. Defendant State of Ohio is a general purpose state government which is capable of being sued, and which is being sued, for granting the tax incentives and certifications of which complaint is made.

14. Mayor Finkbeiner and DaimlerChrysler entered, on November 12, 1998, into Exhibit A, an "Agreement for the Development of Stickney Assembly Plant" ("Development Agreement"). A copy of the Development Agreement is attached hereto and incorporated fully herein by reference.

**Count 1**

**(Unconstitutionality of Property Tax Exemption)**

15. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 13.

16. Ohio Revised Code § 5709.62(C) (1) (copy attached as Exh. B) empowers the legislative authority of an Ohio municipal corporation to enter into an agreement with a business enterprise "under which the enterprise agrees to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees" within a designated "enterprise zone," in return for which the municipal corporation grants the enterprise an exemption for up to ten years of "a specified portion, up to seventy-five percent, of the assessed value of tangible personal property first used in business at the project site as a result of the agreement." Subsection (D) (1) of § 5709.62 authorizes the exemption to exceed seventy-five percent (75%) of the assessed value, if the board of education of the affected school district approves the higher percentage.

17. Pursuant to O.R.C. § 5709.631 (copy attached as Exh. C), any enterprise entering into such an agreement un-

der § 5709.62 must specify in the agreement the investments to be made by the enterprise at the facility and estimate the number of employee positions to be created and the number to be retained by the enterprise due to the project, and the agreement must specify that the municipality may terminate the exemptions if the enterprise materially fails to fulfill its obligations under the agreement.

18. On or about November 12, 1998, the City of Toledo, acting through Defendant Finkbeiner, and the then-Chrysler Corporation (since renamed "DaimlerChrysler") entered into the aforesaid Development Agreement pursuant to the requirements of Ohio Revised Code §§ 5709.62 and 5709.631. The Agreement has the purpose of subsidizing DaimlerChrysler's plans to undertake improvements to its Jeep Parkway Assembly Plant, also located in Toledo, and expansion and construction of the Stickney Avenue plant (jointly referred to as "the Jeep plant project"). In the Agreement, the City provides DaimlerChrysler with a variety of economic incentives in order to induce the company to undertake the Jeep plant project.

19. In paragraph 5.01 of the Development Agreement, DaimlerChrysler covenants that its investment in the Jeep plant project will approximate $1.2 billion and that combined employment at the two Toledo Jeep plants will total about 4900 DaimlerChrysler employees.

20. In paragraph 4.04 of the Development Agreement, the City of Toledo agrees to provide a one hundred percent (100%) exemption from personal property tax for a period of ten (10) years for personal property used by DaimlerChrysler at the Jeep Plant project. This provision of the Agreement is expressly made subject to an additional agreement to be entered into between the City and DaimlerChrysler, the form of which is incorporated in Exhibit 4.04 appended to the Agreement. Exhibit 4.04 conditions the exemption upon DaimlerChrysler's materially fulfilling its covenants as to its

investments in the project and its employment at the facility. Also, both of Defendant school districts have entered into agreements with DaimlerChrysler whereby they consent to the grant of a one hundred percent (100%) exemption in return for DaimlerChrysler's agreement to make specified payments to said school districts.

21. By means of said § 5709.62 and the Development Agreement, the City of Toledo, Toledo Public Schools and Washington Local Schools are providing DaimlerChrysler with a subsidy of millions of dollars in foregone tax revenues in order to induce DaimlerChrysler to continue to locate its plant facilities in Toledo.

22. The Ohio Plaintiffs are injured by this scheme in that the subsidy has the effect of reducing the funds available for the operation of the Toledo Public Schools, Washington Local Schools and City of Toledo, to which the Ohio Plaintiffs contribute through their tax payments. The tax exemption to DaimlerChrysler thereby diminishes the funds available to these governmental bodies for lawful uses and shifts to the Ohio Plaintiffs a disproportionate burden of supporting these governmental functions.

23. One Ohio Plaintiff, Kim's Auto and Truck Service, Inc., is a small business whose real property on Stickney Avenue in Toledo as of the filing of this Complaint is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep plant project. Without the aforesaid tax exemption, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent

loss of business customers, all as a consequence of displacement.

24. This tax incentive was part of a $281,000,000 taxpayer subsidy package which induced DaimlerChrysler to locate its facilities in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan. If the facilities had instead been located in Michigan, such location would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the state of Michigan, from which the Michigan Plaintiffs would have benefitted. The Michigan Plaintiffs are directly injured by Toledo's subsidies to DaimlerChrysler.

25. Under the provisions of § 5709.62, the subsidy provided by Toledo is only available if a business enterprise agrees to locate new or expanded facilities and employment opportunities in specified locations within Ohio. The purpose and effect of § 5709.62 and of the Agreement is to induce DaimlerChrysler and other business enterprises to locate their economic activities in Ohio, rather than elsewhere, by conditioning favorable tax treatment on an enterprise's agreement concerning the location of investment and jobs. In so doing, the statute and Development Agreement discriminate in favor of in-state business activity and investment and against out-of-state activity and investment, in violation of the restrictions imposed on discriminatory state and local taxation by the Commerce Clause of Article 1, § 8 of the U.S. Constitution.

26. Plaintiffs state that one, some or all Defendants, or their predecessors in office, did individually and/or in concert with one another deprive Plaintiffs of the rights afforded them by Art. 1, § 8 of the U.S. Constitution (the "Commerce Clause"), while acting under color of state law, specifically §§ 5709.62 and 5709.631, all in violation of 42 U.S.C. § 1983.

27. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the property tax exemptions authorized by § 5709.62, and preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

**WHEREFORE**, as to Count 1 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. §§ 5709.62 and 5709.631 to be unconstitutional. By way of relief, Plaintiffs pray the Court grant them preliminary and permanent injunctions against the enforcement of the statute(s), together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

**Count 2**
**(Unconstitutionally of O.R.C. § 5709.62 as an Unlawful Exemption)**

28. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 27.

29. O.R.C. § 5709.62 is unconstitutional as applied here in that the tax exemption granted to DaimlerChrysler is not an exemption for "public property used exclusively for any public purpose," nor does the aforesaid tax exemption fit any other classification enumerated in Ohio Const. Art. XII, § 2. Rather, the exemption is being granted to privately-owned property in the furtherance of a private business enterprise and private profits to be derived from said enterprise.

30. By its effect, O.R.C. § 5709.62 imposes an unlegislated and disproportionate tax burden upon the Ohio Plaintiffs, predicated upon Plaintiffs' status as nonbeneficiaries under the statute. Thus the implementation of the tax exemption in favor of DaimlerChrysler as alleged is violative of Plaintiffs' right to the equal protection of the laws as guaranteed to them by Art. I, § 2 of the Ohio Constitution.

31. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the property tax exemptions authorized by § 5709.62, and preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

**WHEREFORE**, as to Count 2 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. §§ 5709.62 and 5709.631 to be unconstitutional. By way of relief, Plaintiffs pray the Court grant them preliminary and permanent injunctions against the enforcement of the statute(s), together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

**Count 3**
**(Tax Exemption Not for a Project Which Retains Employment)**

32. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 31.

33. DaimlerChrysler and the City of Toledo promised the public in the Development Agreement that there would be at least 4,900 permanent, full-time jobs retained as a result of the Jeep project. The final, formal tax exemption agreement, however, refers to the creation only of 4,200 permanent, full-time jobs. As of June 1997, the two Jeep plants in Toledo employed more than 5,300 hourly, permanent, full-time workers. Upon information and belief, however, there may actually be fewer than 4,200 permanent, full-time jobs retained by the Jeep project.

34. One, some or all Defendants have violated O.R.C. § 5709.62 in that a condition of granting of the aforesaid personal property tax exemption to DaimlerChrysler is that the Jeep Plant project "hire new employees, or preserve employment opportunities for existing employees." Plaintiffs

state that the statute requires at least the numbers of jobs to be preserved that existed at the time the exemption was granted or was to go into effect. However, the Jeep Plant project is projected to employ fewer people when it is completed than DaimlerChrysler's two Jeep-related plants in Toledo employed prior to execution of the Development Agreement and/or the effective date of the personal property tax exemption.

35. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the nonconformity of the property tax exemptions authorized by the Development Agreement with the legislated requirements of § 5709.62, and preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

**WHEREFORE**, as to Count 3 of the Complaint, Plaintiffs pray the Court find and declare that one, some or all Defendants have violated the job creation requirement of O.R.C. § 5709.62. By way of relief, Plaintiffs pray the Court grant them preliminary and permanent injunctions against the allowance of the tax exemptions, together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

**Count 4**
**(Unconstitutionality of Investment Tax Credit)**

36. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 35.

37. O.R.C. § 5733.33 (copy attached as Exh. D) establishes a credit against the Ohio corporation franchise tax for purchases of qualifying new manufacturing machinery and equipment which is installed in the state of Ohio. If the machinery and equipment are located in an area within Ohio receiving a distress designation from the Ohio Department of

Development, the credit amount equals thirteen and one-half percent (13 1/2%) of the cost of qualifying machinery and equipment.

38. Section 6.07 of the Development Agreement between the City of Toledo and DaimlerChrysler stipulates that the receipt by DaimlerChrysler of certain "grants, awards, and incentives set forth in Exhibit 6.07" shall be a condition precedent to the performance of DaimlerChrysler's obligations under the Agreement. Among the incentives listed in Exhibit 6.07 is a 13 1/2% percent corporate franchise tax credit on eligible investments made in connection with the Jeep Plant Project, based on the City of Toledo's receipt of a distress designation for purposes of the Project from the Ohio Department of Development. Such credit is authorized by the provisions of § 5733.33.

39. By means of § 5733.33, the State of Ohio has provided DaimlerChrysler with a subsidy of many millions of dollars in foregone tax revenues in order to induce DaimlerChrysler to locate new manufacturing machinery and equipment at its facilities in Toledo.

40. The Ohio Plaintiffs are injured by this scheme in that the subsidy depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs.

41. Further, Plaintiff Kim's Auto and Truck Service, Inc.'s business property on Stickney Avenue in Toledo as of the filing of this Complaint is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep plant project. Without the aforesaid investment tax credit, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from

public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent loss of business customers, all as a consequence of displacement.

42. This tax incentive was part of a $281,000,000 taxpayer subsidy package which induced DaimlerChrysler to continue to operate its plants in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan. If the plant or plants had instead been located in Michigan, they would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefitted. The Michigan Plaintiffs were thus directly injured by Ohio's subsidies to DaimlerChrysler.

43. Under the provisions of § 5733.33, the subsidies provided DaimlerChrysler by Ohio are only available with respect to manufacturing machinery and equipment placed in service within Ohio. The purpose and effect of § 5733.33 is to induce DaimlerChrysler and other business corporations to locate their economic activities in Ohio, rather than elsewhere, by conditioning favorable tax treatment on the corporations' decisions to place new machinery and equipment in Ohio and not elsewhere. Moreover, by providing a credit against the corporate franchise tax measured exclusively by new machinery and equipment placed in service in Ohio, § 5733.33 confers preferential tax treatment on instate businesses. In so doing, the statute discriminates in favor of in-state business activity and against out-of-state activity, in violation of the restrictions imposed on discriminatory state taxation by the Commerce Clause of Art. I, § 8 of the U.S. Constitution.

44. Plaintiffs state that one, some or all Defendants, or their predecessors in office, did individually or in concert

with one another deprive Plaintiffs of the rights afforded them by Art. 1, § 8 of the U.S. Constitution, while acting under color of state law, specifically § 5733.33, in violation of 42 U.S.C. § 1983.

45. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the investment tax credits authorized by § 5733.33, and to preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

**WHEREFORE**, as to Count 4 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. § 5733.33 to be unconstitutional and violative of the U.S. Constitution, and by way of relief, grant them preliminary and permanent injunctions against the operation of said statute, together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

**Count 5**
**(Unconstitutionality of O.R.C. § 5733.33 as unlawful tax relief)**

46. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 45.

47. By its effect, O.R.C. § 5733.33 imposes an unlegislated and disproportionate tax burden upon the Ohio Plaintiffs, predicated upon Plaintiffs' status as nonbeneficiaries under the statute. Thus the implementation of the corporate franchise tax credit to DaimlerChrysler as alleged is violative of Plaintiffs' right to the equal protection of the laws as guaranteed to them by Art. I, § 2 of the Ohio Constitution.

48. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the investment tax credits authorized by § 5733.33, and to preliminary and per-

manent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

**WHEREFORE**, as to Count 5 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. § 5733.33 to be unconstitutional and violative of the Ohio Constitution, and by way of relief, grant them preliminary and permanent injunctions against the operation of said statute, together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

/s/
Terry J. Lodge (0029271)

Peter D. Enrich
Co-counsel for Plaintiffs

[EXHIBIT A TO COMPLAINT]

# AGREEMENT
# FOR THE
# DEVELOPMENT OF
# STICKNEY ASSEMBLY PLANT

---

BETWEEN

CHRYSLER CORPORATION,

AND

THE CITY OF TOLEDO

---

Dated as of

November 12th, 1998

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# AGREEMENT FOR THE DEVELOPMENT OF THE STICKNEY AVENUE ASSEMBLY PLANT

THIS AGREEMENT FOR THE DEVELOPMENT OF THE STICKNEY AVENUE ASSEMBLY PLANT (this "AGREEMENT") is made and entered into as of November 12th, 1998, between CHRYSLER CORPORATION, a Delaware corporation (hereinafter sometimes referred to as "CHRYSLER"); and the CITY OF TOLEDO, an Ohio municipal corporation, hereinafter sometimes referred to as the "CITY".

## RECITALS

A. WHEREAS, CHRYSLER owns real property located within the City of Toledo, Ohio, and facilities located thereon, commonly known as the "Jeep Parkway Assembly Plant" and "Stickney Avenue Assembly Plant"; and

B. WHEREAS, CHRYSLER and the CITY mutually desire to have Chrysler undertake improvements to the Jeep Parkway Assembly Plant and expansion and construction of the Stickney Avenue Assembly Plant (hereinafter sometimes referred to as the "Project"); and

C. WHEREAS, the Project will involve, among other things, the acquisition by the CITY and subsequent conveyance to CHRYSLER of certain real property (the "Property") adjacent to the Stickney Avenue Assembly Plant (which Property along with the Stickney Avenue Assembly Plant are hereinafter sometimes referred to as the "Project Site"); and

D. WHEREAS, for the purpose of carrying out the Stickney Urban Renewal Plan for the purpose of elimination of blight and to obtain redevelopment to prevent recurrence of blight, and for the purpose of creation and preservation of jobs and employment opportunities and improving the economic welfare of the people, the CITY has determined to develop the Property; and

E. WHEREAS, the CITY believes that the redevelopment of the Property with the Project pursuant to this Agreement, and the fulfillment generally of this Agreement, are in the vital and best interests of the CITY and the health, safety, morals, and welfare of its residents, and necessary for the purposes of carrying out the Stickney Urban Renewal Plan, elimination of blight and recurrence of blight and for the creation and preservation of jobs and employment opportunities; and to improve the economic welfare of the people of the CITY; and

F. WHEREAS, in order to induce CHRYSLER to undertake the Project, the CITY has agreed to make available to CHRYSLER certain grants and other economic incentives and to undertake various Project related activities, including: (1) relocation from the Property of residents, businesses, nonprofit organizations and utility facilities; (2) demolition of existing structures above and below grade on the Property; (3) environmental remediation and site preparation of the Property; (4) provision of transportation, utility and other infrastructure facilities and improvements; and (5) partition of the Property into four (4) separate parcels.

NOW, THEREFORE, in consideration of the warranties, representations, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the CITY and CHRYSLER agree as follows:

## ARTICLE I

## CONVEYANCE OF PROPERTY

1.01 Conveyance of Property. The Property (as more fully described in Exhibit 1.01) shall be partitioned by the CITY into separate parcels as generally described and identified in Exhibit 1.01 and more specifically described pursuant to the Surveys to be furnished in accordance with Section 4.03 (each such parcel sometimes referred to hereinafter as a

"Parcel"). Subject to the terms and conditions hereof, and in consideration of CHRYSLER undertaking the Project, the CITY will convey each Parcel to CHRYSLER and CHRYSLER shall receive each Parcel from the CITY in a series of transactions (hereinafter sometimes referred to individually as the "Transaction" and collectively as the "Transactions") for which the Closings shall occur not later than the dates set forth in the following schedule:

| Parcel Number | Not Later Than |
|---|---|
| I | January 1, 1999 |
| II and III | April 1, 1999 |
| IV | January 1, 2000 |

The City covenants and agrees to use its best efforts to fulfill all of the terms and conditions necessary to close the Transactions as soon as reasonably possible in advance of the foregoing schedule.

1.02 Delivery of Property. At each applicable Closing for each Transaction, the CITY shall deliver to CHRYSLER:

(a) An executed and transferable, recordable corporation Warranty Deed (the "Deed") conveying to CHRYSLER marketable title to the Parcel in fee simple, free from all defects, covenants, encroachments, and any other encumbrances, except those easements, restrictions of record, and taxes due and payable after Closing which constitute Permitted Exceptions as hereinafter defined in Section 4.02 and such other matters as may be waived by CHRYSLER;

(b) Such other instrument(s) of conveyance, transfer, assignment or authorization as CHRYSLER may reasonably request;

(c) An owners' affidavit with respect to the Parcel or other similar instrument in a form satisfactory to CHRYS-

LER and Lawyer's Title Insurance Company (the "Title Insurance Company"); and

(d) All information within the CITY'S possession required for reporting purposes to the Internal Revenue Service or any other governmental agencies in connection with the Transaction.

The CITY and CHRYSLER shall each approve and sign closing statements reflecting each Transaction.

1.03 Closing. Each Parcel will be conveyed, and accepted, at a separate closing (each a "Closing"). Each Closing shall occur at such place and on such date and time, subject to the conveyance schedule set forth in Section 1.01, as the CITY and CHRYSLER shall agree (each such date a "Closing Date").

1.04 Proration of Expenses. All costs and expenses with respect to the ownership, occupancy and use of a Parcel prior to an applicable Closing shall be borne by the CITY and after the Closing shall be borne by CHRYSLER; provided, however, that any costs (including public utility charges and fees) incurred by CHRYSLER prior to such Closing in connection with the conduct of its activities shall be borne by CHRYSLER. As to each Parcel, the CITY shall pay all real estate taxes and assessments which are due and payable before each applicable Closing. Any real estate taxes and assessments which become due and payable after an applicable Closing shall be prorated between the parties with the CITY responsible for all such taxes for the period from the last due and payable date up to and including the Closing Date. The CITY shall pay all transfer and conveyance taxes and recording fees by reason of the conveyances contemplated by this AGREEMENT.

1.05 Access to Property. Upon the earlier of the CITY obtaining access or title to any portion of the Property (and in all events, not later than the dates indicated for the portions

of the Property set forth on Exhibit 1.05(1)), the CITY shall provide CHRYSLER and its representatives full access to such portion of the Property, along with any and all books, contracts, data, documents and records of the CITY, with respect to the Property (it being understood that, notwithstanding any such access, investigation or additional information, the CITY shall not be relieved of any of the warranties, representations, covenants or agreements of the CITY, set forth in this AGREEMENT). Such access shall be provided pursuant to, and be conditioned upon, the terms and conditions of the Right of Entry Agreement set forth in Exhibit 1.05(2). As a result of such access and the Right of Entry Agreement, CHRYSLER shall be permitted to conduct such activities as it deems necessary in its sole discretion to construct the Project and determine compliance with the covenants and agreements of the CITY contained herein and to undertake the Project.

## ARTICLE II

## REPRESENTATIONS AND WARRANTIES OF THE CITY

The CITY represents and warrants to CHRYSLER (giving effect to consummation of each of the Transactions contemplated by this AGREEMENT) as follows:

2.01 Organization and Powers. The CITY is a public body corporate duly organized, validly existing and in good standing under the laws of the state of Ohio. The CITY has all requisite corporate power and authority to enter into this AGREEMENT and the CITY has all requisite corporate power and authority to own the Property and to carry out and perform all of its covenants and agreements contained herein.

2.02 Authorization. The execution, delivery and performance of this AGREEMENT by the CITY has been duly authorized by all necessary action, pursuant to Ordinance No. 907-98 passed by the City Council for the CITY on July 14,

1998, and approved by the Mayor of the CITY on July 16, 1998.

2.03 No Conflict. The execution, delivery and performance by the CITY of this AGREEMENT and consummation of the Transactions contemplated hereby do not and will not: (i) violate any provisions of law applicable to it or its charter, ordinances, or any order, judgment or decree of any court or other agency of government binding on it; (ii) conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any of its Contractual Obligations; (iii) result in or require the creation or imposition of any Lien upon any of its properties or assets; or (iv) require any notice to or approval or consent of any Person under any of its Contractual Obligations, except for such approvals or consents as have been obtained and disclosed in writing to CHRYSLER or except where the failure to give such notice or to obtain such approval or consent will not have an Adverse Effect on it or on its ability to consummate the Transactions contemplated by this AGREEMENT or on the ability of CHRYSLER to own the Property and undertake the Project as contemplated herein.

2.04 Governmental Consents. Except as set forth in Exhibit 2.04, the execution, delivery and performance by the CITY of this AGREEMENT and consummation of the Transactions contemplated hereby do not and will not require any registration with, consent or approval of or notice to, or other action to, with or by, any federal, state or other governmental authority, judicial or regulatory body.

2.05 Binding Obligation. This AGREEMENT, when executed and delivered by the parties, will be a legally valid and binding obligation of the CITY, enforceable against it in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

2.06 Title to Property; Liens.

(a) Subject to Permitted Exceptions, the CITY shall have as of each applicable Closing Date good, sufficient and marketable title to the Parcel.

(b) Exhibit 1.01 shall contain a true and complete legal description of each of the Parcels. As of each applicable Closing Date, the CITY shall have exclusive possession (other than Permitted Exceptions) of the Parcel and all buildings and improvements, if any, located thereon.

(c) With respect to a Parcel as of the applicable Closing Date: (i) there shall be no allegations, notices, suits or judgments relating to violations with respect to the Parcel or improvements located thereon of any building, zoning or land use codes, regulations, ordinances and restrictions; (ii) there shall be no challenges or appeals pending which involve the amount or payment of real estate taxes or assessed valuations for the Parcel or any portion thereof, and no special arrangement or agreement shall exist between the CITY, or either of them, and any governmental authority with respect thereto; (iii) there shall be no tax assessment pending or known to be threatened with respect to the Parcel or any portion thereof; and (iv) no labor, material or services shall have been furnished in, on or about the Parcel, or any portion thereof, as a result of which any mechanics', laborers' or materialmen's liens or claims thereof might arise. Except as set forth in Exhibit 2.06(c), the CITY is not aware of anything which would materially interfere with or materially impair the intended use by CHRYSLER of any portion of the Property.

2.07 Broker's Fees. No broker's or finder's fee or commission will be payable by the CITY with respect to the Transactions contemplated by this AGREEMENT. No other similar fees or commissions will be payable by the CITY for any other services rendered to the CITY, or either of them,

ancillary to the Transactions contemplated by this AGREEMENT.

2.08 Disclosure. No representation or warranty of the CITY contained in this AGREEMENT or any other document, certificate or written statement furnished or to be furnished to CHRYSLER, and required by this AGREEMENT, by or on behalf of the CITY for use in connection with the consummation of the Transactions contemplated by this AGREEMENT contained, contains or will contain any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading in light of the circumstances in which the same were made.

2.09 Compliance with Laws. The performance by the CITY of all obligations, covenants, commitments and undertakings of the CITY pursuant to this AGREEMENT is not, and will not be, in violation of any law, ordinance, rule, regulation, order, policy, guideline or other requirement of any domestic or foreign government, or any instrumentality or agency thereof, having jurisdiction over the Property or the Project.

## ARTICLE III

## REPRESENTATIONS AND WARRANTIES OF CHRYSLER

CHRYSLER represents and warrants to the CITY as follows:

3.01 Organization and Powers. Chrysler is a Delaware corporation duly authorized to conduct business in the State of Ohio. Chrysler has all requisite corporate power and authority to enter into this AGREEMENT and to carry out and perform all of its covenants and agreements contained herein.

3.02 No Conflict. The execution, delivery and performance by CHRYSLER of this AGREEMENT and consumma-

tion of the Transactions contemplated hereby and thereby do not and will not: (i) violate any provisions of law applicable to it; (ii) conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any of its Contractual Obligations; (iii) result in or require the creation or imposition of any Lien upon any of its properties or assets; or (iv) require any approval or consent of any Person under any of its Contractual Obligations, except for such approvals or consents as have been obtained and disclosed in writing to the CITY.

3.03 Binding Obligation. This AGREEMENT, when executed and delivered by the parties, will be a legally valid and binding obligation of CHRYSLER, enforceable against it in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

3.04 Broker's Fee. No broker's or finder's fee or commission will be payable by CHRYSLER with respect to any of the Transactions contemplated by this AGREEMENT. No other similar fees or commissions will be payable by CHRYSLER for any other services rendered to it ancillary to the Transactions contemplated by this AGREEMENT.

3.05 Disclosure. No representation or warranty made by CHRYSLER contained in this AGREEMENT or any certificate or any written statement furnished or to be furnished to the CITY, and required by this AGREEMENT, by or on behalf of CHRYSLER for use in connection with the consummation of the Transactions contemplated by this AGREEMENT contained, contains or will contain any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading in light of the circumstances in which the same were made.

3.06 Compliance with Laws. The performance by CHRYSLER of all obligations, covenants, commitments and undertakings of CHRYSLER pursuant to this AGREEMENT is not, and will not be, in violation of any law, ordinance, rule, regulation, order, policy, guideline or other requirement of any domestic or foreign government, or any instrumentality or agency thereof, having jurisdiction over the Property or the Project.

## ARTICLE IV

## COVENANTS OF THE CITY

The CITY covenants to CHRYSLER as follows:

4.01 Acquisition of Property.

The CITY shall acquire good, sufficient and marketable title to the Property as contemplated by Section 2.06(a), so as to convey each Parcel to CHRYSLER in accordance with the schedule set forth in Section 1.01.

4.02 Title Insurance. Not less than forty-five (45) days (or, as to Parcel I not later than November 15, 1998) prior to the Closing Date on which a conveyance of a Parcel is to occur at a Closing, the CITY shall furnish to CHRYSLER a commitment to issue to CHRYSLER an owner's policy of title insurance with respect to the Parcels to be conveyed at a Closing on the Closing Date, which commitment shall be issued by the Title Insurance Company (each such commitment being herein referred to as a "Title Insurance Commitment"). The Title Insurance Commitment shall set forth the state of title to the Parcel together with all exceptions, conditions and reservations to such title, including all liens, easements, restrictions, rights-of-way, covenants, consents and other encumbrances affecting the Parcel and which would appear in an owner's policy of title insurance. The Title Insurance Commitment shall contain the express commitment and requirements of the Title Insurance Company to issue an owner's policy of title insurance (each such policy being

hereinafter referred to as a "Title Insurance Policy") to CHRYSLER in an amount equal to the total consideration paid by the CITY for the Parcel and insuring title to the Parcel free and clear of exceptions, conditions or reservations to title to the Parcel except for Permitted Exceptions as defined below. At such time as the CITY shall deliver a Title Insurance Commitment to CHRYSLER, the CITY shall further cause to be furnished to CHRYSLER true, correct and legible copies of all instruments referred to in the Title Insurance Commitment as exceptions, conditions or reservations to title to the Parcel. CHRYSLER shall have a period of twenty (20) days after its receipt of the Title Insurance Commitment, including copies of the instruments referred to therein as exceptions, conditions or reservations to title to the Parcel, whichever shall last occur, to review such items and to give notice to the CITY of such objections as CHRYSLER may have to any items set forth in the Title Insurance Commitment and the CITY shall within twenty (20) days from the date of receipt of such notice from CHRYSLER correct the objections or have the Title Insurance Company issue its special endorsement insuring against damage caused by such objections in form satisfactory to CHRYSLER in its sole and absolute discretion, and provide evidence thereof to CHRYSLER. The Title Insurance Commitment shall: (a) have no survey exceptions except as to matters disclosed by the related Survey and not objected to by CHRYSLER; (b) have any exception to taxes and special assessments either deleted or limited to taxes and special assessments not due and payable as of the Closing and which are to be prorated at Closing; (c) have any exceptions as to rights of parties in possession expressly deleted; (d) have any exception to easements not shown by public records either deleted or limited to such matters or conditions as are shown on the related Survey; (e) have any exception as to construction liens deleted; (f) have no restrictions or covenants which would in CHRYSLER's sole judgment impair in any way the contem-

plated Project; (g) commit to insure good, marketable, fee-simple title to the Parcel to CHRYSLER, subject only to the exceptions and Surveys Defects to which CHRYSLER shall not object or, alternatively, expressly elect to accept (collectively "Permitted Exceptions"). Thereafter, the CITY shall deliver to CHRYSLER the applicable Title Insurance Commitment updated to a date not less than five (5) days prior to the Closing Date. The CITY shall pay all costs and premiums charged by the Title Insurance Company for the issuance of the Title Insurance Commitment and Title Insurance Policy.

4.03 Survey. Not less than sixty (60) days (or, as to Parcel I, not later than November 15, 1998) prior to the Closing Date on which a conveyance of a Parcel is to occur at a Closing, the CITY shall furnish to CHRYSLER, at the CITY's sole cost and expense, a current ALTA/ACSM as-built plat of survey of the Parcel prepared by a licensed Ohio surveyor (each such survey being hereinafter referred to as a "Survey"). The Survey shall be dated on or after the date hereof, shall bear the surveyor's certification to CHRYSLER, its nominee taking title to the Parcel, if any, its lenders, if any (if known at that time, but added when known or ascertained by CHRYSLER), and the Title Insurance Company, that the Survey was prepared, in accordance with ALTA "Minimum Standard Detail Requirements" and shall show (i) whether any portion of the Parcel is located within a defined flood hazard area or flood plain and, if not, the surveyor shall certify that no portion of the Parcel is located within a defined flood hazard area or flood plain, (ii) all improvements, easements, building lines, curb cuts, parking areas, sewage, water, electricity, gas and other utility facilities (together with recording and/or other information concerning the creation of any such easements, building lines, sewage, water, electricity, gas or other utility facilities), roads and means of physical and record ingress and egress to and from the Parcel by public roads or otherwise and (iii) the gross acreage of the Parcel. The legal description contained in the Survey shall be

used for all purposes hereunder. The Survey shall contain the following certification:

> "This is to certify that this map or plat and the survey on which it is based were made (i) in accordance with "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys," jointly established and adopted by ALTA and ACSM in 1992, and (ii) pursuant to the Accuracy Standards (as adopted by ALTA and ACSM and in effect on the date of this certification) of an Urban Survey."

If the Survey shall shown any encroachments onto the Parcel from any adjacent property, any encroachments by or from the Parcel onto any adjacent property or any violations of any building lines, restrictions or easements affecting the Parcel, or any portion of the Parcel is within a defined flood hazard area or flood plain, or any matter which is not a Permitted Exception hereunder, or if the location of any easement encumbering the Parcel affects the marketability thereof in CHRYSLER's sole and absolute discretion, provided such determination is made in good faith) (collectively "Survey Defects"), CHRYSLER shall give written notice thereof to the CITY within twenty (20) days after receipt of the Survey and the CITY shall within twenty (20) days from the date of receipt of such notice from CHRYSLER, correct the Survey Defects or, at CHRYSLER's election, have the Title Insurance Company issue its special endorsement insuring against damage caused by such Survey Defects (other than any defect based on the location of an easement which affects marketability, which defects must be corrected to the reasonable satisfaction of CHRYSLER) in form satisfactory to CHRYSLER in its sole and absolute discretion, and provide evidence thereof to CHRYSLER If the CITY fails to have such Survey Defects corrected or insured against as provided in this Section 4.03, within such twenty (20)-day

period, CHRYSLER may elect, within five (5) days following the expiration of such period, to (i) terminate this AGREEMENT, or (ii) waive such defect(s) by accepting title to the Parcel subject to such Survey Defects.

4.04 Property Tax Abatement. A 100% exemption from personal property tax for personal property used by CHRYSLER at the Project Site shall be provided for a period of 10 years, as set forth in agreements between CHRYSLER, the CITY, and the Toledo City and Washington Local Schools, the forms of which are attached as Exhibit 4.04.

4.05 Site Preparation. Prior to the applicable Closing Date with respect to the Property and before the final Closing Date with respect to the Project Site, the CITY shall complete or cause to be completed at the CITY'S cost and expense the following site preparation activities:

(a) Vacation of the Property. The CITY shall cause the vacation of all streets, alleys and rights of way, along with all persons occupying or claiming rights to occupy the Property, so that CHRYSLER has exclusive possession of the Parcel, subject to the Permitted Exceptions.

(b) Demolition. All existing improvements above or below existing grade elevations, including streets, curbs, sidewalks, driveways, parking lots, floor slabs, basements, pit walls and floors, underground storage tanks, truck walls, man holes, catch basins, piping, building components, paved surfaces and all other improvements to the Property shall be demolished, removed, excavated and backfilled, by the CITY in accordance with the specifications set forth in Exhibit 4.05(b).

(c) Removal of Debris. All non-soil material, rubble and debris resulting from demolition of improvements or which is otherwise on the Project Site as a result of the site preparation activities described in this section 4.05, shall be

removed and disposed of by the CITY in accordance with all applicable federal, state and local laws.

(d) Clearing, Grubbing and Stripping. All organic materials on the Property shall be cleared, stripped and removed by the CITY. In order to expedite necessary site preparation for construction of the Project by CHRYSLER, the CITY shall clear and grub all organic material excluding topsoil located on the Stickney Avenue Assembly Plant property.

(e) Remediation.

(1) As of the Access Date for each Parcel as set forth in Exhibit 1.05(1) (except as to Parcel I, in which case not later than 30 days after such Access Date), such Parcel shall be investigated and remediated by the City in accordance with the Protocols and Procedures set forth in Exhibit 4.05(e). Upon completion of remediation as required herein of a Parcel, as soon thereafter as reasonably possible, the CITY shall furnish CHRYSLER with a Final Report for such Parcel that includes the following information:

a. Description of the scope of the investigation, including a description of prior uses of the Parcel and the rationale for sampling locations;

b. Description of all remedial activities, together with verification that the remediation work was performed to the standards required herein;

c. Confirmation sample results and, if applicable, any continuing remedial activity in adjacent Property that is attributable to contamination on the Parcel being investigated and remediated; and

d. Any "No Further Action" letters, covenants or other correspondence related to the environmental condition of the Parcel.

(2) Prior to any backfilling, CHRYSLER may, at its sole discretion, inspect the Parcel, request additional information, and accept or reject the CITY's Final Report with any such rejection constituting an Event of Default as that term is defined herein. Any acceptance by CHRYSLER of a Parcel shall not constitute a waiver of CHRYSLER's rights or the CITY's obligations to remediate the Property, including the groundwater, as required herein.

(3) For purposes of this Section 4.05(e), the individuals to whom any Amendments to this Section 4.05(e) or Final Report (or comments thereon) should be sent are:

| On behalf of the CITY | On behalf of CHRYSLER |
|---|---|
| Casey Stevens<br>Project Manager<br>Environmental Services Division<br>348 S. Erie Street<br>Toledo, Ohio 43602<br>419-936-3757 | Greg Rose<br>Manager, Site Remediation<br>800 Chrysler Drive<br>CIMS 482-00-51<br>Auburn Hills, MI 48326<br>(248) 576-7362 |

(f) Reuse of Soil. CHRYSLER may elect to use any soil excavated by the CITY from the Property which meet the requirements of Section 4.05(e) and, if necessary, stockpile such soil at a location on the Property acceptable to both parties. To the extent CHRYSLER does not elect to use any such excavated soil, the CITY shall remove such soil from the Property for reuse or disposal in accordance with all applicable laws, regulations and ordinances. Under no circumstances shall the removal of such soil be identified with CHRYSLER's Stickney Avenue Jeep Plant RCRA identification number or attributed by manifest or otherwise to CHRYSLER as a generator.

(g) Backfilling and Grading. All basements, double basements, truck wells, manholes, catch basins, holes, pits, sewers, man-made depressions and voids, whether previously existing or created by demolition, excavation, utility removals or remediation (collectively "Voids"), shall be backfilled, dewatered and the Property shall be graded and compacted by the CITY in accordance with the specifications set forth in Exhibit 4.05(b).

(h) Wetlands. The CITY has received a permit pursuant to Section 404 of the Clean Water Act to fill in all wetlands within the Project Site. Filling of all wetlands on the Project Site shall be performed by the CITY in accordance with such permit and applicable law. All backfill material used by the CITY to fill any wetlands shall meet standards which are equal to or greater than those set forth in Exhibit 4.05(b) as well as the requirements of the permit.

(i) Utility Infrastructure Improvements and Services.

(1) Subject to the specifications set forth in Exhibit 4.05(b) and except as otherwise provided in Exhibit 4.05(i), the CITY shall cause without cost to or claim of contribution by third parties from CHRYSLER, the appropriate CITY-provided utility services to deactivate, remove and/or relocate all utility buildings, service facilities and similar equipment within the Property or the Project Site at such times as shall permit the parties to fulfill their respective obligations in this Agreement.

(2) The CITY shall cause to be constructed, without cost to or claim of contribution by third parties from CHRYSLER, such CITY-provided public utility infrastructure improvements, including water and sewer line extensions to the new Stickney Avenue Assembly Plant, as described by, and in accordance with the specifications set forth in Exhibit 4.05(i).

(3) The CITY shall provide certificates and such other evidence as CHRYSLER may request from each CITY-provided public utility servicing or having facilities in, the parcel or the Project Site which shall demonstrate the extension, deactivation, removal, relocation, location and capacity of all utility facilities deemed necessary by CHRYSLER for the Project.

(4) The CITY shall take such actions as are within its authority to facilitate and coordinate any of the same undertakings described in paragraphs (1), (2) and (3) of this Section 4.05(i) by public utilities other than CITY-provided utilities as are necessary to fulfill the requirements of Section 6.09.

(j) Storm Water. All construction performed by the CITY in connection with the Site Preparation Activities described in this Section 4.05 or as otherwise required pursuant to this Agreement shall be performed in accordance with the Storm Water Pollution Prevention Plan for Construction Activities Associated with the Stickney Avenue Jeep Facility Expansion dated January, 1998, as the same may be amended from time to time.

(k) Safety. In connection with all such site preparation activities, the CITY shall be responsible for taking all necessary measures to assure the safety and security of the Property and all visitors thereto, and to eliminate the presence or occurrence of any hazards, nuisances or other potential liabilities.

4.06 Road and Other Infrastructure Improvements. The CITY shall cause to be constructed, without cost to or claim of contribution by third parties from CHRYSLER, road and other infrastructure improvements in connection with the Project in accordance with the specifications set forth in Exhibit 4.06.

4.07 Cooperation. From and after the date hereof, the CITY shall use its best efforts and cooperate with CHRYSLER to secure all consents, approvals, authorizations, exemptions and waivers as are described in Article VI hereof or as shall be required in order to enable CHRYSLER to consummate the Transactions contemplated by this AGREEMENT and to undertake the Project.

4.08 Further Assurances. From and after the date hereof the CITY shall at the request of CHRYSLER execute and deliver any such further instruments or documents and take all such further action as CHRYSLER may request to evidence consummation of the Transactions contemplated by this AGREEMENT.

4.09 Post-Closing Assistance. From and after the date hereof, the CITY shall be available to CHRYSLER for consultation and assistance in connection with construction of the Project at such times and in such manner as CHRYSLER shall reasonably request.

4.10. Water Utility Rates. Commencing with the initiation of production at the new Stickney Avenue Assembly Plant and for a period of five (5) years thereafter, the water services of the CITY shall be provided to CHRYSLER at the Jeep Parkway Assembly Plant and new Stickney Avenue Assembly Plant at the rate and terms in effect for such services at the Jeep Parkway Assembly Plant as of July 26, 1997.

## ARTICLE V

## COVENANTS OF CHRYSLER

CHRYSLER covenants with the CITY as follows:

5.01 Project. Subject to economic conditions and productivity and technological changes, CHRYSLER will upon acquisition of the Property commence construction in 1998 of the Project. The value of the Project is presently estimated at $1.2 billion with combined employment at the Jeep Park-

way Assembly Plant and Stickney Avenue Assembly Plant currently anticipated to be approximately 4,900 CHRYSLER employees.

5.02 Cooperation. From and after the date hereof, CHRYSLER shall cooperate with the CITY to secure all consents, approvals, authorizations, exemptions and waivers as shall be required in order to enable CHRYSLER to consummate the Transactions contemplated by this AGREEMENT and to undertake the Project.

5.03 Further Assurances. From and after the date hereof, CHRYSLER shall at the request of the CITY, or either of them, execute and deliver any such further instruments or documents and take all such further action as the CITY, or either of them, may request to evidence consummation of the Transactions contemplated by this AGREEMENT.

5.04 Access To Stickney Avenue Assembly Plant. From and after the date hereof until completion of the CITY's responsibilities in Section 4.05, CHRYSLER shall provide the CITY and its representatives, upon prior written notification, such access to the Stickney Avenue Assembly Plant as described in Exhibit 5.04, along with any and all data, documents and records of CHRYSLER, or CHRYSLER's consultant, with respect to the Stickney Avenue Assembly Plant, as is necessary for the CITY to undertake and complete the obligations set forth in Exhibit 5.04.

5.05 Infrastructure Improvements. CHRYSLER shall convey to the CITY at no cost to the CITY, not later than January 1, 1998, such portions of the Project Site as described in Exhibit 5.05 which CHRYSLER owns and is necessary for the CITY to construct the infrastructure improvements described in Exhibit 4.06. Such conveyance shall be by warranty deed with the expenses associated with title insurance, survey or other charges incidental to the conveyance to be borne by the CITY.

## ARTICLE VI

## CONDITIONS PRECEDENT TO OBLIGATIONS OF CHRYSLER

The obligations of CHRYSLER to consummate the Transactions contemplated by this AGREEMENT shall be subject to the fulfillment (or waiver) at or prior to each Closing of each of the following conditions:

6.01 Accuracy of Representations Warranties, Covenants and Agreements of the SELLERS. The CITY shall have complied in all material respects with all of its covenants and agreements contained herein to be performed at or prior to the Closing, all representations and warranties of the CITY contained herein shall be true in all material respects on and as of the Closing Date with the same effect as though made on and as of such Closing Date and, except to the extent that such representations and warranties were made as of a specified date, such representations and warranties shall continue on such Closing Date to have been true in all material respects as of the specified date.

6.02 Certificate of Fulfillment. The CITY shall have delivered to CHRYSLER at the Closing a certificate in the form attached hereto as Exhibit 6.02 and incorporated herein, dated as of the Closing Date, as to the accuracy of the CITY'S representations, warranties, covenants and agreements and the fulfillment of each of the conditions set forth in Article IV and Section 6.01.

6.03 Absence of Actions or Proceedings. There shall be no actual or threatened action or proceeding by or before any court, other governmental body or arbitration tribunal which shall seek to restrain, prohibit or invalidate any of the Transactions contemplated by this AGREEMENT or which might affect the right of CHRYSLER to undertake the Project which, in the judgment of CHRYSLER made in good faith and based upon advice of its counsel, makes it inadvisable to

proceed to consummate the Transactions contemplated by this AGREEMENT.

6.04 Further Action. All consents, approvals, authorizations, exemptions and waivers that shall be required in order to enable CHRYSLER to consummate the Transactions contemplated by this AGREEMENT shall have been obtained.

6.05 Opinion of Counsel. The CITY shall have delivered to CHRYSLER an opinion of its legal counsel in the form attached hereto as Exhibit 6.05 and incorporated herein.

6.06 Approvals for Project. CHRYSLER shall have received all consents, permits, approvals, authorizations, exceptions and waivers that shall be required in order for CHRYSLER to undertake the Project, including any necessary rezoning approvals, variances, special use permits, building permits, environmental permits and consents, tax abatement certificates and any other approvals and authorizations of federal, state or local governmental bodies or agencies or third parties, including but not limited to those set forth on Exhibit 6.06.

6.07 Governmental Grants Awards and Incentive Programs. CHRYSLER shall have received the grants, awards and incentives set forth in Exhibit 6.07 from all applicable federal, state and local units of government.

6.08 Landfill Settlements. Chrysler, the State of Ohio and the City shall have entered into settlement agreements regarding landfills commonly known as "North Cove" and "Dura", the material terms of which shall comport with the "LANDFILL" provisions of Mayor Carleton Finkbeiner's July 26, 1997 letter to Chrysler Chairman Robert Eaton.

6.09 Utility Improvements. All utility improvements, including building service facilities, utility transmission facilities and similar equipment, necessary to the maintenance and operation of the Project and the Stickney Avenue Assembly

Plant, shall have been constructed and activated, in accordance with the specifications set forth in Exhibit 4.05(i).

6.10 Zoning. As of the date of Closing relating to the Parcels, the zoning classification of any such Parcel shall be M-2, Industrial District, and the proposed use of the Project Site for automotive manufacturing purposes shall be a permitted use as a matter of right under that zoning classification.

## ARTICLE VII

## CONDITIONS PRECEDENT TO OBLIGATIONS OF THE CITY

The obligations of the CITY to consummate the Transactions contemplated by this Agreement shall be subject to the fulfillment (or waiver) at or prior to each Closing of each of the following conditions:

7.01 Accuracy of Representations, Warranties, Covenants and Agreements of CHRYSLER. CHRYSLER shall have complied in all material respects with all of its covenants and agreements contained herein to be performed at or prior to each Closing Date and, except as otherwise contemplated hereby, all representations and warranties of CHRYSLER contained herein shall be true in all material respects on and as of such Closing Date with the same effect as though made on and as of such Closing Date and, except to the extent that such representations and warranties were made as of a specified date, such representations and warranties shall continue on such Closing Date to have been true in all material respects as of the specified date.

7.02 No Prohibition. No statute, rule or regulation promulgated by any Person or order of any court or administrative agency shall be in effect which prohibits the CITY from consummating the Transactions contemplated by this AGREEMENT.

7.03 Opinion of Counsel. CHRYSLER shall have delivered to the CITY an opinion of its independent legal counsel, Cooper, Martin, Chojnowslci & Beck, P.C., in the form attached hereto as Exhibit 7.03 and incorporated herein.

## ARTICLE VIII

## INDEMNITY AND RELEASES

8.01 Reciprocal Indemnity. To the extent permitted by law, and except as otherwise provided in Section 8.02, each party agrees to indemnify, defend and hold harmless the other party, their respective affiliates and their respective shareholders, directors, officers, employees and agents from and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, costs and expenses, including, without limitation, interest, penalties and attorneys fees and expenses, asserted against, resulting to, imposed upon or incurred by the other party by reason of or resulting from any breach of any representation, warranty, covenant or agreement of the party contained in or made pursuant to this Agreement or the Settlement Agreement between the parties dated January 22, 1998 relating to the Dura, North Cove and Stickney Avenue Landfills.

8.02 Environmental Indemnity. From and after the date of this Agreement:

(a) The CITY will indemnify, defend and hold CHRYSLER harmless from all claims, losses, oversight costs, response costs, penalties, property damage, personal injury, or contribution claimed by any third party (including the State of Ohio or the United States) attributable to or arising from:

(1) Except as otherwise provided in subparagraph C(3) of Exhibit 4.05(e), any Environmental Condition of the Property that pre-dates transfer of title to the Property to CHRYSLER;

(2) The acts, errors or omissions of the CITY related to any Site Preparation Activities as described in this Agreement; and

(3) The CITY's past, present or future treatment, handling, disposal, release or threat of release of Hazardous Substances at or from the Project Site.

(b) CHRYSLER will indemnify, defend and hold the CITY harmless from all claims, losses, oversight costs, response costs, penalties, property damage, personal injury or contribution claimed by any third party (including the State of Ohio or the United States) attributable to or arising from:

(1) Releases of Hazardous Substances by CHRYSLER at the Project Site while CHRYSLER holds title to the affected property;

(2) Releases of Hazardous Substances by third parties at the Project Site while CHRYSLER holds title to the affected property;

(3) CHRYSLER'S past, present, or future treatment, handling, disposal, release or threat of release of Hazardous Substances taken from the Project Site; and

(4) Any Environmental Condition of that portion of Stickney Avenue Assembly Plant to be transferred to the CITY pursuant to Section 5.05 which pre-dates the transfer of title to such portion.

(c) "Hazardous Substances" means:

(1) Hazardous Substances as defined in the Comprehensive Environmental Response, Compensation and Liability Act

of 1980, as revised, Public Law 96-510, 94 Stat. 2767; or

(2) Petroleum as defined in ORC 3746.01(I).

## ARTICLE IX

## DEFAULT BY THE CITY AND REMEDIES

9.01 Event of Default by the CITY. If the CITY shall, other than as a result of any Force Majeure, fail to comply with or perform any of the warranties, representations, covenants or agreements of the CITY contained herein, such a failure shall constitute a default by the CITY under this AGREEMENT (an "Event of Default by the CITY").

9.02 Remedies and Obligations. Upon the occurrence of any Event of Default by the CITY, CHRYSLER shall notify the CITY, which shall have thirty (30) days from the date of such notice to cure, at the City's cost, the Event of Default. Thereafter, the sole and exclusive remedy available to CHRYSLER, without any further notice to the CITY, being one or more of the following:

(a) Refrain from any further performance of its covenants and agreements contained herein until the Event of Default by the CITY shall have been cured to CHRYSLER's satisfaction; or

(b) Rescind the AGREEMENT, whereupon CHRYSLER may, but shall not be obligated to, promptly quit claim all of its right, title and interest in and to each Parcel to the CITY; or

(c) Seek damages (subject to Section 11.02); or

(d) Cure the default and seek damages (subject to Section 11.02).

## ARTICLE X

## DEFAULT BY CHRYSLER AND REMEDIES

10.01 Event of Default by CHRYSLER. If CHRYSLER shall, other than as a result of any Force Majeure, fail to comply with or perform any of the warranties, representations, covenants or agreements of CHRYSLER contained herein, such a failure shall constitute a default by CHRYSLER under this AGREEMENT (an "Event of Default by CHRYSLER").

10.02 Remedies and Obligations. Upon the occurrence of any Event of Default by CHRYSLER, the CITY shall notify CHRYSLER thereof with the sole and exclusive remedy available to the CITY without any further notice to CHRYSLER, being damages subject to Section 11.02.

## ARTICLE XI

## LIMITATION OF REMEDIES

11.01 Survival of Representations, Warranties, Covenants and Agreements. The representations, warranties, covenants and agreements of the CITY and CHRYSLER contained in this AGREEMENT shall survive the Closing without limitation as to time.

11.02 Limitation of Remedies. Except as provided in Article VIII and Subsections 9.02(a) and (b), the sole and exclusive remedy against each party by reason of any breach of any of the representations and warranties made herein or in any ancillary document or the failure to comply with any of the covenants and agreements contained herein or in any ancillary documents to be performed or complied with shall be limited to reimbursement of the direct out-of-pocket expenses and costs incurred by the party as a result of such breach or failure to comply.

## ARTICLE XII

## DEFINITIONS

12.01 Definitions. The following terms, as used herein, have the following respective meanings:

"Adverse Effect" means, with respect to any Person, an adverse effect upon the business, operations, properties, prospects, assets or condition (financial or otherwise) of the Person as a result of the occurrence or existence of any single event or condition or series of events or conditions in the aggregate.

"Agreement" means this Agreement for the Development of Stickney Avenue Assembly Plant, as amended, modified or supplemented from time to time in accordance with the terms hereof.

"CHRYSLER" has the meaning assigned to such term in the introductory paragraph of this Agreement.

"Closing" has the meaning assigned to such term in Section 1.03.

"Closing Date" has the meaning assigned to such term in Section 1.03.

"Contractual Obligation," as applied to any Person, means any provision of any deed of trust, contract, lease, license, undertaking, agreement or other instrument to which that Person is a party or by which it or any of its properties is bound or to which it or any of its properties is subject.

"Environmental Condition" means the presence of contaminants in soil in excess of the clean up standards set forth in Exhibit 4.05(e).

"Event of Default by CHRYSLER" has the meaning assigned to such term in Section 9.01.

"Event of Default by the CITY" has the meaning assigned to such term in Section 8.01.

"Force Majeure" means, with respect to any Person, any strike, picket line, boycott effort, fire, flood, freeze, accident, war (whether or not declared), revolution, riot, insurrection, act of God, act of any governmental Person, act of any public enemy, scarcity or rationing of gasoline or other fuel or vital products, inability to obtain materials or labor or other event which is reasonably beyond the control of such Person.

"Lien" means, with respect to the Property and each Parcel, any lien, mortgage, pledge, security interest, charge or encumbrance of any kind, whether voluntary or involuntary (including any conditional sale or other title retention agreement, any lease in the nature thereof and any agreement to give any security interest).

"Stickney Avenue Assembly Plant" has the meaning assigned to such term in the recitals.

"Parcel" has the meaning assigned to such term in Section 1.01.

"Permitted Exceptions" has the meaning assigned to such term in Section 4.02.

"Person" means an individual, corporation, partnership, limited liability company, trust, organization, association, governmental body or agency or other entity.

"Project" has the meaning assigned to such term in the "Recitals".

"Property" has the meaning assigned to such term in Section 1.01.

"CITY" has the meaning assigned to such term in the introductory paragraph of this Agreement.

"Survey" has the meaning assigned to such term in Section 4.03.

"Title Insurance Company" has the meaning assigned to such term in Section 1.02(c).

"Voids" has the meaning assigned to such term in Subsection 4.05(g).

12.02 Other Definitional Provisions. References to "Articles," "Sections," "Subsections," "Clauses," and "Exhibits," if any, shall be to Articles, Sections, Subsections, Clauses, Exhibits and Exhibits, respectively, of this Agreement unless otherwise specifically provided. Any of the terms defined in this Agreement, unless the context otherwise requires, may be used in the singular or the plural depending on the reference. In this Agreement, "hereof," "herein," "hereto," "hereunder" and the like mean and refer to this Agreement as a whole and not merely to the specific Article, Section, Subsection or Clause in which the respective word appears; words importing any gender include the other genders; references to "writing" include printing, typing, lithography and other means of reproducing words in a tangible visible form; the words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation"; references to agreements and other contractual instruments shall be deemed to include subsequent amendments, assignments, and other modifications thereto, but only to the extent such amendments, assignments and other modifications are not prohibited by the terms of this Agreement; references to Persons include their respective permitted successors and assigns or, in the case of governmental Persons, Persons succeeding to the relevant functions of such Persons; and all references to statutes and related regulations shall include any amendments of same and any successor statutes and regulations.

## ARTICLE XIII

## MISCELLANEOUS

13.01 Expenses. CHRYSLER and the CITY shall pay all costs, fees, and expenses incurred by it or them in connection with the negotiation, review, documentation, preparation, performance, compliance with and closing of this AGREEMENT.

13.02 Exhibits. To the extent any of the Exhibits shall not have been completed at or prior to the date hereof, the CITY and CHRYSLER shall complete such Exhibits as soon as practicable after the date hereof and, (except as otherwise provided herein) in all events, not later than September 30, 1998.

13.03 Notices. Any notice, request, claim, demand or other communication to be given or delivered under or by reason of the provisions of this AGREEMENT will be in writing and will be deemed to have been given when delivered personally or mailed by certified or registered mail, return receipt requested, and postage prepaid, to the recipient. Such notices, demands and other communications will be sent as follows:

(a) If to the CITY:

City of Toledo
One Government Center
Suite 2200
Toledo, Ohio 43604
Attention: Carleton S. Finkbeiner, Mayor

With a copy to:

City of Toledo Law Department
One Government Center, Suite 2250
Toledo, Ohio 43604
Attention: Edward M. Yosses, Director

(b) If to CHRYSLER

Chrysler Corporation
CIMS 485-09-96
1000 Chrysler Drive
Auburn Hills, Michigan 48326-2766
Attention: Vice President-Government Affairs

With a copy to:

Chrysler Corporation
CIMS 485-13-32
1000 Chrysler Drive
Auburn Hills, Michigan 48326-2766
Attention: William T. McLellan, Esq.
Office of the General Counsel

or in any of the foregoing cases to such other address as such party may hereafter specify for such purpose by notice to the other parties referred to above.

13.04 Force Majeure. In the event of any delay in the performance of or compliance with any of the covenants or agreements contained herein as a result of any Force Majeure, the time for such performance or compliance shall be extended for the period of such delay.

13.05 Negotiations. The CITY and CHRYSLER have participated jointly in the negotiation, review, documentation and preparation of this AGREEMENT and, accordingly, in the event of any ambiguity or question of intent or interpretation, this AGREEMENT shall be construed as if prepared jointly by the CITY and CHRYSLER and no presumptions or burdens of proof shall arise in favor or disfavor of either the CITY or CHRYSLER by virtue of the authorship of any of the provisions hereof.

13.06 Limitation of Rights to Parties. Nothing in this AGREEMENT, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this

AGREEMENT on any persons other than the parties to it and their respective successors, legal representatives and assigns, nor is anything in this AGREEMENT intended to relieve or discharge the obligation or liability of any third persons to any party to this AGREEMENT, nor shall any provisions give any third persons any rights of subrogation or action over or against any party to this AGREEMENT.

13.07 Amendments and Waivers. Except as otherwise provided herein, any provision of this AGREEMENT may be amended or waived if, but only if, such amendment or waiver is in writing and is signed by the CITY and CHRYSLER. Except as otherwise provided in this AGREEMENT, any failure of the CITY (or CHRYSLER) to comply with any obligation, covenant, agreement or condition herein may be waived by CHRYSLER (or the CITY) only by a written instrument signed by it, but such waiver or failure to insist upon strict compliance with such obligation, covenant, agreement or condition shall not operate as a waiver of or estoppel with respect to any subsequent or other failure.

13.08 Severability. Whenever possible, each provision of this AGREEMENT will be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this AGREEMENT is held to be invalid, illegal or unenforceable under any applicable law in any jurisdiction, such provision will be ineffective only to the extent of such invalidity, illegality or unenforceability in such jurisdiction, without invalidating the remainder of this AGREEMENT in such jurisdiction or any provision hereof in any other jurisdiction.

13.09 Headings. The Section and Subsection headings of the Articles of this AGREEMENT are for reference purposes only and shall not affect the meaning or interpretation of this AGREEMENT.

13.10 Counterparts; Effectiveness. This AGREEMENT and any amendments, waivers, consents or supplements may

be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This AGREEMENT shall become effective upon the execution of a counterpart hereof by the CITY and CHRYSLER.

13.11 Successors and Assigns. Except as otherwise provided herein, all of the terms and provisions of this AGREEMENT shall be binding upon, shall inure to the benefit of and shall be enforceable by the CITY and CHRYSLER and their respective successors and assigns. This Agreement may be assigned to an entity affiliated with CHRYSLER or its successor without the approval of the CITY.

13.12 Provisions Not Merged with Deed. No provision of this AGREEMENT is intended to or shall be merged by reason of any deed or conveyance instrument transferring title to the Parcels or any portion thereof from the CITY to CHRYSLER or any successor in interest, and any such deed or conveyance instrument shall not be deemed to affect or impair the provisions and covenants of this AGREEMENT.

13.13 Time of Essence. Time is of the essence of this AGREEMENT.

13.14 Entire Agreement. This AGREEMENT, including all Exhibits and other documents attached hereto or incorporated by reference herein, shall constitute the entire agreement of the CITY and CHRYSLER with respect to the subject matter hereof and supersede all other understandings, oral or written, with respect to the subject matter hereof.

13.15 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio without regard to the conflicts of law principles thereof. Jurisdiction and venue for resolution of any dispute or question of interpretation arising out of this Agreement or

the undertakings herein shall be in the Federal District Court, Northern District of Ohio.

IN WITNESS WHEREOF, the CITY and CHRYSLER have duly executed this AGREEMENT as of the date first above written.

WITNESS:

/s/

/s/

CHRYSLER CORPORATION

By: /s/
W. Frank Fountain
Its: Vice President - Government Affairs

WITNESS:

CITY OF TOLEDO

By: /s/
Carleton S. Finkbeiner
Its: Mayor

Approved as to Content:

/s/ 11/13/98
Barry Broome
Acting Director of Development

Approved as to Content:

/s/
Director, Department of Law

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **CHARLOTTE CUNO**, *et al.*, | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No. 3:00CV7247 |
| **DAIMLERCHRYSLER, INC.**, | ) | MEMORANDUM OPINION |
| *et al.*, | ) | |
| Defendant. | ) | |

KATZ, J.

This matter is before Court on Plaintiffs' motion for remand (Doc. No. 12) and Plaintiffs' supplemental motion for remand (Doc. No. 18). For the following reasons, Plaintiffs' motions will be denied.

## BACKGROUND

The eighteen named plaintiffs in this action are challenging the legality of approximately $280,000,000 in tax benefits that were granted to Defendant DaimlerChrysler, Inc. to induce it to remain in Toledo, Ohio. On November 12, 1998, Defendants City of Toledo, Toledo Public School District, and Washington Local School District (collectively "the municipal Defendants")[1] entered into an agreement with DaimlerChrysler whereby DaimlerChrysler received a ten-year exemption from taxes that otherwise would be levied on personal property first put into use at DaimlerChrysler's facility ("the property tax exemption"), and a credit against its state

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[1] Plaintiffs have also named Carleton L. Finkbeiner, Mayor of Toledo, as a defendant.

corporate franchise tax for certain qualifying investments ("the investment tax credit").

In Counts I and II of their amended complaint, Plaintiffs allege that the Ohio statutory scheme permitting the property tax exemption, Ohio Rev. Code §§ 5709.62(C) (1) & 5709.631, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution. In Count III, Plaintiffs allege that even if Ohio Rev. Code §§ 5709.62(C) (1) & 5709.631 are constitutional, DaimlerChrysler was not qualified for the property tax exemption. In Counts IV and V of their amended complaint, Plaintiffs allege that the Ohio statutory scheme permitting the investment tax credit, Ohio Rev. Code § 5733.33, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution.

Plaintiffs originally filed their complaint in the Lucas County, Ohio, Court of Common Pleas. Defendants removed the action to this Court pursuant to 28 U.S.C. § 1441, alleging federal question jurisdiction arising out of Plaintiffs' federal constitutional challenges to the statutes at issue. Plaintiffs have moved to remand the case to state court, on multiple grounds.[2] Defendants have filed opposition, Plaintiffs have replied, and Defendants have filed a surreply. The Court discusses the parties' contentions below.

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[2] The grounds for remand stated in the supplemental motion duplicate those stated in the initial motion for remand; both motions may be considered simultaneously.

## DISCUSSION

### A. Tax Injunction Act

The Plaintiffs claim that this Court lacks jurisdiction over this matter as a result of the Tax Injunction Act, 28 U.S.C. § 1341, and its underlying principles of comity. *See In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). The Tax Injunction Act states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

The Tax Injunction Act is inapplicable here. *In Jefferson Co. v. Acker*, 527 U.S. 423, 433-34, 119 S. Ct. 2069, 2076, 144 L. Ed. 2d 408 (1999), the Supreme Court held, "By its terms, the Act bars anticipatory relief, suits to stop ('enjoin, suspend, or restrain') the collection of taxes. . . . But a suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description of suits barred from federal district court adjudication." *Id.* at 433-34, 119 S. Ct. at 2076 (citations omitted). If successful, Plaintiffs' claim would invalidate both the property tax exemption and the investment tax credit, forcing the collection of those taxes. Although the Tax Injunction Act is inapplicable on its face, the analysis cannot end there.

Before dispensing with Plaintiffs' Tax Injunction Act argument, this Court must consider comity. "Although the Tax Injunction Act may not be applicable, we cannot ignore the policies underlying the Act." *Gillis*, 836 F.2d at 1005.[3] Fur-

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[3] Note that the instant case is distinguishable from *Gillis*. In *Gillis*, the Court noted that the petitioners were "not really seeking to increase the total taxes raised, but rather are saying that the sum that is being raised should be allocated differently." *Gillis*, 836

[Footnote continued on next page]

ther, "[A]bstention and stay doctrines may counsel federal courts to withhold adjudication, according priority to state courts on questions concerning the meaning and proper application of state law." *Jefferson County*, 527 U.S. at 435 n.5, 119 S.Ct. at 2077; *see also ACLU Found. of Louisiana v. Crawford*, No. CIV.A. 00-1614, 2000 WL 1273406 (E.D. La. Sept. 5, 2000). In this case, comity does not require this Court to withhold adjudication; not only would the underlying purpose of the Tax Injunction Act not be served by a refusal to adjudicate the case, but the state has expressly consented to waive considerations of comity through its motion to remove the case to this Court and through representations to that effect made within its pleadings.

The purpose of the Tax Injunction Act was "to stop out-of-state corporations from using diversity jurisdiction to gain injunctive relief against a state tax in federal court, an advantage unavailable to in-state taxpayers denied anticipatory relief under state law." *Jefferson County*, 527 U.S. at 435, 119 S. Ct. at 2077. That is not the case here. Furthermore, it is well-established that a state may waive considerations of comity in the case of the *Younger* abstention. *See Ohio Civil-Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626, 106 S. Ct. 2718, 2722, 91 L. Ed. 2d 512 (1986); *Brown v. Hotel Employees*, 468 U.S. 491, 500, n.9, 104 S. Ct. 3179, 3185, n.9, 82 L. Ed. 2d 373 (1984) ("Since the State's Attorney General has thereby agreed to our adjudication of the controversy, considerations of comity are not implicated . . . ."); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-480, 97 S. Ct. 1898, 1903-1904,

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[Footnote continued from previous page]

F.2d at 1008, n.4. Here, the Plaintiffs are attempting to increase the total taxes raised.

52 L. Ed. 2d 513 (1977). By analogy, then, the state may waive considerations of comity under the Tax Injunction Act. The Plaintiffs have advanced no compelling reason for a different result in this case. Remand pursuant to the mandates of the Tax Injunction Act would therefore be inappropriate.

B. Eleventh Amendment Immunity

The Eleventh Amendment to the Constitution acts as a general bar to suits brought in federal court against a state by a citizen of that state or another state. *See Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). Plaintiffs claim that this Court lacks jurisdiction because three of their five claims request declaratory and injunctive relief directed against Ohio officials, and this relief is barred under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Since some claims may be barred by the Eleventh Amendment, Plaintiffs reason, all claims before the Court are barred. In support of their proposition, Plaintiffs cite *Frances J. v. Wright*, 19 F.3d 337, 340 (7th Cir. 1994). Unfortunately, Plaintiffs fail to mention that the holding in *Francis J* was *specifically abrogated* by the Supreme Court in *Wisconsin Dept. of Corr. v. Schact*, 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998). "A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims. . . . A federal court can proceed to hear those other claims . . . ." *Id.* at 392-93, 118 S. Ct. at 2054. No Eleventh Amendment bar to suit has yet been asserted by any of the Defendants. Therefore, the Eleventh Amendment does not eliminate this Court's removal jurisdiction in this case.

C. Standing

Plaintiffs argue that remand of this case is appropriate because all of the Plaintiffs have standing in state court,

while the standing of some Plaintiffs in federal court is more dubious. This contention by the Plaintiffs has created something of a problem for all of the litigants. Although they would like to return to state court, the Plaintiffs have not been able to bring themselves to argue that they completely lack standing in federal court; on the other hand, the Defendants have not been overly eager to argue that Plaintiffs have adequate standing to appear in this Court, no doubt because they would like to preserve the issue for later consideration. Of course, since the Defendants removed this action to federal court, the burden of proving jurisdiction, and therefore standing, is theirs. *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999).

Since lack of standing would render this Court without jurisdiction, the issue must be examined closely and determined at this juncture. Among the named plaintiffs are Toledo residents, Michigan residents, non-profit and for-profit corporations in Toledo, residents whose property was taken through eminent domain to be used as part of the DaimlerChrysler Toledo plant, and an Ohio corporation characterized as being located within the boundaries of an anticipated expansion of the DaimlerChrysler Toledo plant.

There are three requirements for a litigant to have standing under Article III of the federal Constitution: injury, causation, and redressability. *See Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (1993). The injury suffered must be personal. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471-72, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700. For causation to exist, the injury must be able to be traced to the defendant's conduct. *See Northeastern Florida Contractors*, 508 U.S. at 663, 113 S. Ct. 2302. Finally, the relief from a remedy obtained by a favorable ruling must not be "too speculative." *See id.*

At the bare minimum, the Plaintiffs who are taxpayers have standing to object to the property tax exemption and franchise tax credit statutes under the "municipal taxpayer standing" rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923). "The interest of a taxpayer or a municipality in the application of its moneys is direct and immediate." *Id.* at 486, 43 S. Ct. at 601. In *Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840 (6th Cir. 1984), the Sixth Circuit determined that both taxpayers in and students of a school district that was being denied money by a state law had standing to bring suit, since both groups were "in positions to suffer direct and tangible injuries from the deduction. . . ." *Id.* at 844; *see also Hawley v. City of Cleveland*, 773 F.2d 736, 742 (6th Cir. 1985) ("[T]he Supreme Court continues to allow suits by nonfederal taxpayers to enjoin unconstitutional acts affecting public finances."); *United States v. City of New York*, 972 F.2d 464, 466 (2d Cir. 1992) ("[Taxpayers] have standing to challenge the legality of municipal expenditures even when there is no likelihood that resulting savings will inure to the benefit of the taxpayer.").

In their complaint, Plaintiffs allege that the property tax exemption reduces the funds available for the operation of the Toledo and Washington Local Schools. This is an injury that is fairly traceable to the application of the statutes at issue; further, a favorable decision appears likely to redress Plaintiffs' injury. These allegations are sufficiently similar to those in *Gwinn* to allow a finding, at least at this early stage in the litigation, that Plaintiffs have standing to proceed in federal court.

D. *Pullman* Abstention

Plaintiffs have asked that this Court abstain based on the doctrine of *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). *Pullman* abstention is appropriate "when the construction of an unclear

statute would obviate the necessity for a decision on the federal constitutional question." *Heitmanis v. Austin*, 899 F.2d 521, 529 (6th Cir. 1990).

Plaintiffs have presented three situations in which they suggest unclear statutes might be construed to avoid a constitutional decision. Two of these involve Article 1, Section 2 of the Ohio Constitution, which is Ohio's guarantee of equal protection. The third involves DaimlerChrysler's compliance with O.R.C. § 5709.62, the enterprise zone statute. None of these suggest a compelling reason for abstention.

The proper interpretation of Article 1, Section 2 of the Ohio Constitution is by no means unclear or ambiguous. In fact, Ohio's equal protection clause is "substantially the same as the guarantee in that respect contained in the Fourteenth Amendment to the federal Constitution." *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 560, 9 N.E.2d 684, 687 (1937). When the accepted interpretation is clear, there is no need for the district court to defer merely to allow a state court to rule first. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S. Ct. 507, 511, 27 L. Ed. 2d 515 (1971).

Plaintiffs' reliance on an unsettled interpretation of O.R.C. § 5709.62 as a vehicle for abstention is also misguided. Although interpretation of the statute may be unsettled (though Plaintiffs have offered nothing to show that this is the case), neither a finding for the Plaintiffs nor a finding against them would implicate any constitutional issues; therefore no need for a federal ruling could be obviated by a state court interpretation of the statute. *Pullman* abstention in this case is therefore inappropriate.

E. *Younger*, *Colorado River*, *Thibodaux*, and *Burford Abstention*

Plaintiffs have made passing reference to abstention based on *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483

(1976), and have requested abstention based on *Younger v. Harris*, 401 U.S. 37 (1971), 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). Argument for abstention on either basis is frivolous, since both require the existence of pending state proceedings. *See Colorado River*, 424 U.S. at 818, 96 S. Ct. at 1246-47; *Middlesex Co. Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982). Despite Plaintiffs' assertions to the contrary, there is no indication of any pending state proceeding in this case.

Plaintiffs have also made reference to abstention based on *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959). *Thibodaux* abstention is only appropriate in suits where jurisdiction is based on diversity, 28 U.S.C. § 1332. This case is not in this Court under diversity jurisdiction, and *Thibodaux* abstention is inappropriate.

Finally, Plaintiffs have invoked *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). *Burford* involved unsettled state law and complex administrative proceedings. *Id.* at 327-28, 63 S. Ct. at 1104. There are no such circumstances here, and *Burford* abstention would be inappropriate.

## CONCLUSION

Accordingly, and for the foregoing reasons, Plaintiffs' motion to remand and Plaintiffs' supplemental motion to remand are denied.

IT IS SO ORDERED.

s/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLOTTE CUNO, *et al.*,

Plaintiff, Case No. 3:00 CV 7247

-vs- JUDGMENT ENTRY

DAIMLERCHRSLER, INC., *et al.*,

Defendant.

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs' motion to remand (Doc. No. 12) and Plaintiff's supplemental motion to remand (Doc. No. 18) are Denied.

FURTHER ORDERED that Plaintiffs' motion to amend complaint to add a new party plaintiff (Doc. No. 25) is Granted.

/s/ David A. Katz
DAVID A. KATZ
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 5 2005
OFFICE OF THE CLERK

25

No. 04-1704

IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

*Petitioner,*

v.

CHARLOTTE CUNO, ET AL.,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Sixth Circuit**

## BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

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## QUESTIONS PRESENTED

1. Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33.

2. Whether Ohio's investment tax credit, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

## PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court of appeals were plaintiffs Charlotte I. Cuno, Duane M. Arquette, Robert Scott Brundage, Julie Coyle, Helen Czapczynski, Mary Ebright, Carrie Hawkins, Kathleen Hawkins, Hutton Pharmacy, Inc., Jean E. Kaczmarek, Kim's Auto and Truck Service, Inc., Judith A. Pfaff, Kenneth P. Pfaff, Phoenix Earth Food Co-op, Inc., Carol A. Raschke, Herbert H. Raschke, Rick Van Landingham, and defendants DaimlerChrysler Corporation, the Toledo Public School District, the Washington Local School District, the City of Toledo, the State of Ohio, the Ohio State Treasurer, the Ohio Department of Taxation, and the Ohio Department of Development.

## RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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## BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 386 F.3d 738 (6th Cir. 2004). The order of the court of appeals denying rehearing (Pet. App. 31a) is unreported. The opinion and order of the district court (Pet. App. 18a-30a) is reported at 154 F. Supp. 2d 1196 (N.D. Ohio 2001).

## JURISDICTION

The Court has posed the question whether respondents have standing to challenge the Ohio investment tax credit. Petitioners believe that respondents lack standing.

Respondents originally filed suit in state court. Petitioners removed the case to federal court pursuant to 28 U.S.C. § 1441. The district court had jurisdiction pursuant to that statute and 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on October 19, 2004. The court of appeals denied DaimlerChrysler's petition for rehearing en banc on January 18, 2005. On April 7, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including June 17, 2005. The petition for a writ of certiorari was filed on June 17, 2005, and granted on September 27, 2005. 126 S. Ct. 36 (2005). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution, U.S. Const. art. I, § 8, cl. 3, provides in relevant part:

> The Congress Shall have Power * * * To Regulate commerce * * * among the several States.

Ohio Revised Code Ann. § 5733.33 is reproduced in the Petition Appendix at 32a-43a.

## STATEMENT OF THE CASE

Several Ohio and Michigan taxpayers have challenged Ohio's investment tax credit—a "subsidy" designed to incentivize capital investment in the State's most economically depressed areas—principally on the ground that "the subsidy depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments." J.A. 28a (Complaint for Declaratory and Injunctive Relief ¶ 40). Just as they do now, respondents lacked Article III standing to bring this challenge. The court of appeals did not address standing, instead ruling solely on the merits. Its decision stands for the proposition that the Commerce Clause of the United States Constitution (or, more specifically, its so-called negative or dormant aspect) prohibits states from offering such tax incentives to encourage economic development. If upheld, hundreds of similar tax programs and, presumably, other incentives to development, offered by most states would similarly fall. But that decision finds no support in the purpose of the Commerce Clause or this Court's dormant Commerce Clause decisions. To the contrary, the ruling below deviates widely from Commerce Clause principles announced by this Court and does violence to important concepts of federalism fundamental to the Constitution's structure. The decision of the Sixth Circuit should accordingly be reversed.

### *1. Ohio's Investment Tax Credit*

"Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion." Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996) (footnotes omitted).

Such "[l]ocation[al] incentives have become an ubiquitous feature of the state tax scene." Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377, 384 (1996). And of the myriad state and local provisions that are intended to attract and encourage business development, "[t]he most common form of state tax incentive in this country is the income tax credit." Hellerstein & Coenen, *supra*, 81 Cornell L. Rev. at 817.

This case involves a constitutional challenge to one such provision, the State of Ohio's investment tax credit ("ITC"). *See* Ohio Rev. Code Ann. ("O.R.C.") § 5733.33. The ITC is typical of the economic development tax incentives offered by states across the country. It encourages businesses to increase investment in machinery and equipment by reducing one of the largest single costs of doing business in Ohio—the State's corporate franchise tax. *See* O.R.C. § 5733.06. As even the respondents acknowledge, the ITC functions as a subsidy, reducing the cost of doing business and thus offering a non-recurring economic incentive to invest capital.

The ITC makes a corporate taxpayer eligible for a "nonrefundable credit . . . against" Ohio's corporate franchise tax. O.R.C. § 5733.33(B)(1). The corporate franchise tax applies to for-profit corporations "for the privilege of doing business in [Ohio], owning or using a part or all of its capital or property in [Ohio], holding a certificate of compliance with the laws of th[e] state authorizing it to do business in [Ohio], or otherwise having nexus in or with [Ohio] . . . ." *Id.* § 5733.01(A); *see also Wesnovtek Corp. v. Wilkins*, 825 N.E.2d 1099, 1100 (Ohio 2005).

A taxpayer is entitled to the ITC if it purchases and installs "new manufacturing machinery and equipment" in Ohio during the time periods set forth in the statute. O.R.C. § 5733.33(B)(1). The ITC "is equal to seven and one-half per cent of the excess of the cost of the new manufacturing

machinery and equipment purchased" by the taxpayer during a calendar year for use in an Ohio county, over and above the taxpayer's average annual expenditures on new manufacturing machinery and equipment in that county during three specified prior years. *Id.* § 5733.33(C)(1). The size of the credit increases to thirteen and one-half percent if the otherwise qualifying investment is made in an "eligible area" that suffers from specified levels of unemployment or poverty, or has experienced significant business closings or downsizing by local employers. *Id.* §§ 5733.33(C)(2), (A)(8)-(16). The ITC may exceed $1,000,000 if, in the year for which it is claimed, the taxpayer has increased its overall ownership of manufacturing equipment in the State.[1] *Id.* § 5733.33(B)(2)(a).

As a nonrefundable credit, the ITC may be used only to offset liability for the franchise tax. *Id.* § 5733.33(B)(1). The credit is used over seven years in increments of "one-seventh of the credit amount for the tax year immediately following the calendar year in which the new manufacturing machinery and equipment is purchased." *Id.* § 5733.33(C)(4). Any portion of the ITC remaining unused may be carried forward an additional three years. *Id.* § 5733.33(D).

The ITC is a significant tool in Ohio's ongoing effort to encourage capital investment in the State. In its certiorari

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[1] Ohio law also provides that a municipal corporation may offer a property tax exemption to an enterprise that develops facilities or preserves employment in a distressed area. O.R.C. § 5709.62. Respondents also challenged the constitutionality of the property tax exemption extended by the City of Toledo, but the district court and the Sixth Circuit both upheld that provision. *See* Pet. App. 14a, 29a. Respondents' petition for a writ of certiorari based on that part of the Sixth Circuit's ruling remains pending with this Court. *See* Pet. for Writ of Cert., *Cuno v. DaimlerChrysler Corp.*, No. 04-1407 (U.S. Apr. 18, 2005).

petition, Ohio explained that, since the credit's inception in 1995, corporations have invested more than $30 billion in plants and equipment in Ohio in reliance on the ITC. *See* Pet. for Writ of Cert., *Wilkins v. Cuno*, No. 04-1724 (U.S. June 17, 2005), at 4.

### 2. *Background Of The Litigation*

In 1998, petitioner DaimlerChrysler entered into an agreement with the City of Toledo, Ohio, to construct a new vehicle assembly plant near the company's existing facility in the City. Pet. App. 2a. DaimlerChrysler estimated that it would invest approximately $1.2 billion in the new plant, thereby creating several thousand new jobs in an economically distressed area. *Id.* The City and the affected local school districts agreed that the company would receive the tax incentives made available by state law to encourage local economic development. Pursuant to O.R.C. § 5733.33, one of the incentives DaimlerChrysler received was an investment tax credit of thirteen and one-half percent for the investments it has made related to the project through December 31, 2000.

Invoking the U.S. Constitution's Commerce Clause and the Ohio Constitution, respondents, nearly all of whom are Ohio or Michigan taxpayers, brought this action in Ohio state court against DaimlerChrysler, the State of Ohio, and the City of Toledo. Advancing what they have readily conceded is a "novel legal theory" (No. 01-3960, *Cuno v. DaimlerChrysler Corp.* (6th Cir.), Pl.'s. Br., at viii), respondents mounted a facial challenge to the ITC statute. *See* J.A. 30a-31a. As respondents asserted claims under the federal Constitution, petitioners removed the case to the United States District Court for the Northern District of Ohio. *See* C.A. J.A. 12-14. Respondents moved to remand the case to state court, arguing, *inter alia*, that "there are substantial doubts about [respondents'] ability to satisfy either the constitutional or the prudential limitations on standing in the federal court."

C.A. J.A. 138. Petitioners opposed remand, arguing that at least one respondent had standing to bring each of the federal claims raised in the complaint. *See* C.A. J.A. 158-65, 195-205. With regard to respondents' federal challenge to the City of Toledo's property tax abatement, petitioners argued that respondents had standing under the doctrine of municipal taxpayer standing. *See* C.A. J.A. 161-62, 197-99 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)). With regard to respondents' Commerce Clause challenge to the ITC, petitioners argued that Kim's Auto and Truck Service, Inc., a business located in the development zone and slated for condemnation to make way for the Jeep plant, had standing. *See* C.A. J.A. 163-64, 200-01. The district court denied the motion to remand, holding that, "under the 'municipal taxpayer standing' rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447," "at least at this early stage in the litigation, . . . Plaintiffs have standing to proceed in federal court." J.A. 78a.

The district court ultimately rejected respondents' claims on the merits. Pet. App. 18a-30a. After canvassing relevant case law, the court concluded that the "investment tax credit is not akin to a tariff, since it does not burden in the slightest the transfer of goods in interstate commerce," and that the credit also does not punish activity occurring outside of Ohio. *Id.* 28a. The court accordingly held that the tax credit does "not 'discriminate against interstate commerce,'" concluding that it could not find the credit unconstitutional without "violat[ing] the clear mandate of Supreme Court precedent," and dismissed respondents' complaint. *Id.* 29a-30a.

### *3. The Decision Below*

The Sixth Circuit reversed in part, holding that the investment tax credit is unconstitutional. Pet. App. 1a-17a. The court began by recognizing that "it is legitimate for Ohio to structure its tax system to encourage new interstate economic activity" and that the Commerce Clause does not

"prevent a state from 'compet[ing] with other States for a share of interstate commerce.'" *Id.* 4a-5a (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336-37 (1977)). The court also acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* 6a. However, it still found that the ITC violated the dormant Commerce Clause. *Id.* 9a-11a.

The Sixth Circuit concluded that the ITC failed the third prong of the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), holding that, when coupled with the ITC, Ohio's franchise tax "discriminate[s] against interstate commerce." Pet. App. 4a. The court rejected any "distinction between laws that benefit in-state activity and laws that burden out-of-state activity." Pet. App. 9a. "[A]s between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden . . . while a competitor that invests out-of-state will face a comparatively higher tax burden . . . ." *Id.* 6a. In the Sixth Circuit's view, Ohio's decision not to give the same tax credit to a business that chooses to expand outside of Ohio is itself a burden on interstate commerce. *See id.* 9a-10a. Additionally, the court rejected any analogy of tax credits like the ITC to constitutionally permissible direct subsidies, even though the court harbored "no doubt [that they] have the same economic effect." *Id.* 10a. Reasoning that the reward for investing in Ohio was in fact a tool of "coerc[ion]" that discourages corporations from investing elsewhere, *id.* 6a, the Sixth Circuit concluded that the ITC unconstitutionally discriminates against interstate commerce.

Even though the issue was noted in the petitions for rehearing, the court of appeals did not address respondents' standing to sue.

## SUMMARY OF ARGUMENT

1. In contrast to every other dormant Commerce Clause case to reach this Court, the parties challenging the constitutionality of Ohio's ITC do not claim that their interstate activities are burdened by the allegedly unconstitutional state action. Respondents are not among the similarly-situated businesses that the lower court believes are "coerced" into investing in Ohio lest they forfeit the benefit of a credit against their Ohio franchise tax as a consequence of investing elsewhere. Respondents thus lack Article III standing to challenge Ohio's franchise tax-and-credit regime.

The minimum requirements for Article III standing are clear: (1) an "injury in fact"; that is, "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood, not mere speculation, "that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). The taxpayer respondents, who purport to be aggrieved by the tax credit because "the subsidy depletes the funds of the State of Ohio to which Plaintiffs contribute through their tax payments," J.A. 28a, fail to meet these requirements. Their claim is nothing more than a generalized grievance, available to any citizen, about his taxes. This Court has long held that such an alleged injury is insufficient for Article III purposes. Indeed, here the case for taxpayer standing is even weaker than usual, because respondents complain not that the State imposes a discriminatory tax on them, but that a credit against that tax (which most respondents do not pay) somehow reduces the State's overall tax receipts to which respondents contribute. This is not a concrete and particularized injury capable of creating a justiciable case or controversy.

One respondent, Kim's Auto & Truck Service, Inc. ("Kim's Auto"), alleges a different kind of harm—economic injuries arising out of the forced relocation of its business—a relocation that was supposedly caused by the State's enactment of the ITC, which in turn caused DaimlerChrysler to seek to locate its plant on Kim's Auto's property, which in turn led the City of Toledo to seize that property by eminent domain. Even assuming that the relocation of Kim's Auto constitutes a cognizable injury, it still cannot satisfy the second and third requirements for standing. The injuries allegedly suffered by Kim's Auto were not caused, in any meaningful way, by Ohio's enactment of the ITC. Rather, the displacement of Kim's Auto was caused solely by eminent domain proceedings initiated by the City of Toledo. Moreover, there is ***no*** likelihood whatsoever that Kim's Auto's alleged economic injuries can be redressed by a favorable decision. Even if the court had granted the relief requested in the complaint—invalidation of the ITC—that would not have stopped the taking of Kim's Auto's property through eminent domain proceedings. Moreover, during the pendency of this case, the eminent domain proceedings involving Kim's Auto became final. Thus, even if Kim's Auto prevailed in this suit, the courts could grant Kim's Auto no meaningful relief.

2. Even assuming that one or more of the respondents has standing to sue, respondents' dormant Commerce Clause challenge to Ohio's ITC must fail on its merits. As recognized by this Court's precedents, the negative aspect of the Commerce Clause—the so-called dormant Commerce Clause—preserves our federal system by prohibiting the several States from distorting economic markets through the enactment of protectionist barriers to out-of-state competition. This Court has struck down state regulatory or taxation schemes that created such barriers and thereby threatened to create a "multiplication of preferential trade areas," tearing asunder our national economic market. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Reasoning that "eco-

nomically speaking, the effect of a tax benefit or burden is the same," the court of appeals concluded that Ohio's ITC was just such a market-distorting, protectionist measure. Pet. App. 10a. The Sixth Circuit's mode of analysis is simplistic and deeply flawed. Ohio's ITC is not the sort of nefarious, protectionist measure that favors indigenous industry at the expense of out-of-state competitors. Indeed, far from erecting a barrier to interstate commerce, tax credits like Ohio's promote commerce—interstate and intrastate—by spurring competition between the States to create attractive environments for capital investment and economic development.

The taxation regimes struck down by this Court have taken several forms: a tax on an industry with different rates for in-state and out-of-state actors, *see, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-73 (1984); *Boston Stock Exchange*, 429 U.S. at 331-32; a tax on both in-state and out-of-state actors with an offsetting credit available only to in-state actors, *see, e.g., Maryland v. Louisiana*, 451 U.S. 725, 753-60 (1981); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 398-407 (1984), or a tax on in-state and out-of-state actors for the purpose of funding rebates or subsidies to the in-state actors, *see, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194-97 (1994). Whatever the particular design of the state taxation regime in question, those struck down by this Court under the dormant Commerce Clause all share two salient features: First, the state placed an actual financial burden on interstate commerce, which is to say, on out-of-state actors or out-of-state transactions; second, the state unfairly discriminated against interstate commerce by placing a greater financial burden on out-of-state actors than in-state actors.[2] Ohio's ITC suffers from neither of these flaws.

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[2] This Court has also struck down state taxation schemes, even if non-discriminatory, when they are unfairly apportioned. *See, e.g., Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 273-75

a. Although this Court often enough has subjected tax credits and exemptions to Commerce Clause scrutiny where the "benefits" to in-state actors are accompanied by greater "burdens" on out-of-state actors or activity, *see, e.g.*, *Maryland v. Louisiana*, 451 U.S. at 753-60, neither respondents nor the decision below identify a single case in which this Court has struck down a credit or exemption when the underlying tax does not reach the out-of-state transaction against which the state tax scheme supposedly discriminates. For dormant Commerce Clause scrutiny to apply, this Court's precedents require at least that the challenged state tax fix an actual financial burden on interstate commerce. Here, though, Ohio's franchise tax does not levy against the out-of-state conduct that is supposedly the object of Ohio's discrimination—capital investments outside of Ohio. Indeed, far from increasing a corporation's Ohio franchise tax burden, out-of-state investments generally have the effect of reducing a corporation's liability under the franchise tax. The ITC is, as respondents allege in their complaint, simply a "subsidy" to in-state investments. J.A. 28a.

The court of appeals short-circuited the dormant Commerce Clause analysis by assuming as a matter of "economic[s]" that any in-state benefit accorded by the ITC reflexively generates a corresponding out-of-state burden. This was error. Because Ohio's franchise tax does not levy

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(1987) (invalidating as unfairly apportioned flat $25 "marker fee" and flat "axle tax" levied on all trucks operating in or passing through Pennsylvania). The "central purpose" of the fair apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction, *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), and that interstate commerce is "not unjustly burdened by multistate taxation," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997). Respondents have never alleged—nor did the Sixth Circuit hold—that Ohio's corporate franchise tax is unfairly apportioned. *See* Pet. App. 4a.

against or otherwise burden out-of-state investments, the ITC functions merely as a subsidy to in-state investment—an exercise of state police power never before questioned by this Court, or indeed, by the courts of appeals.

b. Nor does application of the ITC only to in-state investments discriminate against out-of-state investors. Different treatment is not discrimination unless the parties are similarly situated. DaimlerChrysler and a company that chooses to invest out-of-state are not similarly situated vis-à-vis the Ohio franchise tax. First, the company that increases investment out-of-state decreases its percentage of Ohio business value and Ohio activity. Thus, rather than expose a greater amount of its income or net worth to Ohio franchise tax liability, under the franchise tax's apportionment formula, the new out-of-state investment will, in all likelihood, result in a reduction in the company's effective Ohio tax rate. Second, any tax impact of the decision to invest out-of-state will be governed, naturally enough, by the laws of the state or foreign country where the new investment is located. Thus, Ohio's decision to reward in-state investment neither burdens nor discriminates against businesses wishing to invest outside of Ohio.

Ohio's ITC, undeniably designed to encourage local economic development, is not the type of anti-competitive protectionist measure the Commerce Clause was meant to prohibit. Rather, by lowering the cost of doing business in Ohio, it legitimately encourages rational economic actors to do business there. Accordingly, there is no basis whatsoever for the Sixth Circuit's conclusion that Ohio's ITC violates the dormant Commerce Clause.

## ARGUMENT

### I. RESPONDENTS' CHALLENGE TO THE INVESTMENT TAX CREDIT SHOULD BE DISMISSED FOR LACK OF STANDING

This case arrives at this Court in an unusual procedural posture. In the removal proceeding, it was respondents who articulated doubts concerning their own standing to sue, while petitioners argued that those doubts were largely misplaced. Although petitioners argued before the district court that respondents had standing to challenge the constitutionality of the ITC through the allegations of Kim's Auto, upon reflection, the better view is that respondents lack standing.[3] *See generally* Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in* Daimler-Chrysler v. Cuno, 4 Geo. J.L. & Pub. Pol'y (forthcoming Feb. 2006), *available at* http://ssrn.com/abstract=859784. This Court's dormant Commerce Clause cases have conferred standing only on those parties whose interstate commerce was actually burdened by the challenged state action (and, occasionally, their customers). That is to say, this Court has found cognizable only the dormant Commerce Clause claims of those actually injured by the state action, and has never, in a dormant Commerce Clause case, conferred standing on a taxpayer as such. To do so here would flatly contradict this Court's most forceful standing precedents. Those cases confirm the Article III case-and-

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[3] In its petition for rehearing from the decision of the court of appeals, Ohio argued that respondents lacked standing to pursue the litigation. *See* Pet. for Reh'g of Gov't Appellees, *Cuno v. DaimlerChrysler Corp.*, No. 01-3960 (6th Cir. Sept. 15, 2004), at 9-15. DaimlerChrysler concurred that vacatur of the judgment was appropriate if the court agreed with the State. *See* Pet. for Reh'g of Appellee DaimlerChrysler Corp., *Cuno v. DaimlerChrysler Corp.*, No. 01-3960 (6th Cir. Sept. 16, 2004), at 15 n.6.

controversy requirements that a plaintiff allege a particularized injury-in-fact (1) that is not speculative or hypothetical, (2) that is fairly traceable to (*i.e.*, is caused by) the defendant's conduct, and (3) that is capable of being redressed by the relief sought in plaintiffs' complaint. *See Lujan*, 504 U.S. at 560.

In this case, with the exception of Kim's Auto, respondents' complaint alleges only generalized taxpayer grievances and otherwise fails to articulate the cognizable and particularized injury-in-fact required by this Court's standing decisions. And Kim's Auto also lacks standing, because whatever economic injury it might have suffered as a result of its relocation is not traceable to Ohio's enactment of the ITC; Kim's Auto's injury instead was caused by eminent domain proceedings initiated by the City of Toledo. Moreover, even if one assumed that the State did cause injury to Kim's Auto by enacting the ITC, the alleged injuries arising out of the displacement of Kim's Auto are not redressable by the injunctive or declaratory relief sought in the complaint. The property on which Kim's Auto once stood was seized last summer by the City of Toledo pursuant to its eminent domain power, Kim's Auto was compensated for that taking, and the Stickney Avenue Jeep Plant now occupies the parcel that previously belonged to Kim's Auto. The declaratory and injunctive relief sought in the complaint, even if granted, will change none of that.

### A. The Court Has Accorded Standing In Dormant Commerce Clause Cases Only To Parties Whose Interstate Commerce Is Burdened By State Action

This Court has ***never*** conferred standing to challenge state action under the dormant Commerce Clause to taxpayers as such. Indeed, in virtually every case in which the Court has applied the dormant Commerce Clause, the plain-

tiff with standing to press the action has been a person or entity whose interstate commerce was supposedly burdened by the challenged state action.[4] *See, e.g., Granholm v. Heald*, 125 S. Ct. 1885 (2005) (suit brought by out-of-state winery and state residents affected by ban on direct shipment of out-of-state wine); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (suit brought by non-profit corporation subject to higher property tax rate because of its predominantly out-of-state clientele).

Not so here. Respondents are not out-of-state entities who pay the challenged tax, competitors of taxpayers who obtain unfairly favorable tax treatment, or customers of entities that are handicapped by an allegedly unfair taxing regime. Instead, respondents are, for the most part, residents of the taxing State who would like that State to collect ***more*** tax from out-of-state companies doing in-state business. They are not, in any meaningful way, burdened by Ohio's enactment of the ITC; nor will they benefit in any concrete manner from its abolition and the creation of the purported "level playing field" between in-state and out-of-state competitors. Rather than seeking to remedy a cognizable injury they have suffered, their avowed goal is to "save the states from themselves," *see* Enrich, *supra*, 110 Harv. L. Rev. at 377, by precluding states from competing for business development

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[4] In a handful of cases, the court has recognized associations that represent a group whose interstate commerce was burdened by state action as having standing to bring a dormant Commerce Clause challenge. *See, e.g., Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419 (2005). Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court recognized Maryland's and other states' standing to invoke the Court's original jurisdiction, not only as a direct purchasers of natural gas subject to Louisiana's first-use tax, but also as *parens patriae* of their citizens whose natural gas costs had also increased as a result of the tax. *Id.* at 737-38.

through the use of tax incentives that (in respondents' view) reduce state tax revenue. Whether or not this is desirable as a matter of public policy, it is an exceedingly strange use of the Commerce Clause, which has never before been permitted to function as a sword wielded by state taxpayers who are unhappy with steps taken by their elected officials to lure business across state lines. *Cf. Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) ("[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes"). These are the sorts of plaintiffs whose suit is "more likely to frustrate than to further" Commerce Clause objectives and who, accordingly, cannot be viewed as "reliable" champions of Commerce Clause values. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987).[5]

### B. The Ohio Taxpayers Have Not Alleged A Cognizable Injury

It is axiomatic that "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every other citizen's interest in proper application of the Constitution and laws, and seeking relief that no more

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[5] Accordingly, respondents fail the prudential "zone of interests" requirement for standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). "The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *Gen. Motors*, 519 U.S. at 300. Moreover, insofar as respondents are championing not their own interests, but those of corporations whose investment decisions are actually affected by the Ohio ITC—as evidently contemplated by the court of appeals, *see* Pet. App. 6a, 8a-9a—they are advancing the interests of businesses who have chosen ***not*** to sue. Respondents' claims thus "fall[] squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others." *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also, e.g., Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922) (Brandeis, J.). Accordingly, suits premised on federal or state taxpayer status, as a general matter, "are not cognizable in the federal courts." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.). As the Court explained in 1923, a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote . . . that no basis is afforded for an appeal." *Mellon*, 262 U.S. at 487. For a taxpayer to establish standing, the Court explained, he "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.

For purposes of this rule, the Court has "likened state taxpayers to federal taxpayers." *ASARCO*, 490 U.S. at 613 (opinion of Kennedy, J.). This conclusion rests on *Mellon*'s observation that the interest of a federal taxpayer in the use of public funds is "comparatively minute and indeterminable," 262 U.S. at 487, which the Court has held to be "equally true when a state Act is assailed,"[6] *Doremus v. Bd.*

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[6] The Court has suggested that a different standard applies to *municipal* taxpayers, presuming that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Mellon*, 262 U.S. at 486; *see also ASARCO*, 490 U.S. at 613 (opinion of Kennedy, J.). Reliance on that doctrine would surely be misplaced here where respondents challenge a *state* tax, and, that State has a population of 11.3 million (*see* U.S. Census Bureau, *Ohio Fact Sheet, available at*

*of Educ.*, 342 U.S. 429, 434 (1952). Under the standard articulated in these decisions, state taxpayers will not have standing unless they complain of a "direct pecuniary injury," advance a "good-faith pocketbook action" that seeks to redress "a direct dollars-and-cents injury," and possess "the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Id.* at 434-35.

The decision in *Doremus* accordingly "confirmed that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." *Valley Forge Christian Coll.*, 454 U.S. at 477; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 n.8 (2004) (state taxpayer must allege "the 'direct dollars-and-cents injury' that our strict taxpayer-standing doctrine requires" (quoting *Doremus*, 342 U.S. at 434)). It is not enough that the challenged program is "likely to produce additional taxation to be imposed upon a vast number of taxpayers," *Mellon*, 262 U.S. at 487; instead, state taxpayers like respondents must demonstrate that the contested state program has a concrete, ascertainable, and immediate pecuniary impact on them.

The Ohio taxpayer respondents allege only that they are directly "injured" by the tax credit because it unlawfully "depletes the funds of the State of Ohio to which Plaintiffs contribute through their tax payments, thereby diminishing the

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http://factfinder.census.gov) and an annual budget of approximately $24.8 billion (*see* Ohio Office of Budget and Management, *The Ohio Budgetary Financial Report for the Fiscal Year Ended June 30, 2005* (July 25, 2005), at 4, *available at* http://www.obm.ohio.gov/finrep/budgtry/budgtry05.pdf.); *see also* Hickman, *supra*, at 18-20 (arguing that municipal taxpayer standing doctrine is rooted in the non-sovereign status of municipalities).

funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs." J.A. 28a. This allegation cannot satisfy the *Doremus/Mellon* standard; the Ohio taxpayers did not suffer the "direct pecuniary injury," and are not advancing the "good-faith pocketbook action," that *Doremus* and *Mellon* require. Respondents do not claim that *they* are paying an unconstitutional tax, that *they* will obtain a refund or related remedy if they prevail in this litigation, or even that *they* are the customers of taxpayers who pay tax at a discriminatory rate and therefore suffer indirectly from the assertedly unconstitutional discrimination. *Cf. Gen. Motors Corp.*, 519 U.S. at 286-87; *Bacchus Imps., Ltd.*, 468 U.S. at 267. Instead, the injury alleged by respondents is essentially identical to that asserted by the taxpayer in *Mellon*: that the challenged statute has a financial impact on the state and therefore will "increase the complainant's future [state] income taxes." *United States v. Richardson*, 418 U.S. 166, 171-72 (1974).

The Court consistently has held this sort of allegation to be insufficient to confer standing. Respondents do not assert any "special circumstances" that distinguish them from all other state and federal taxpayers who might bring similar challenges to spending or tax incentive programs. *ASARCO*, 490 U.S. at 614 (opinion of Kennedy, J.). It is, of course, "pure speculation whether th[is] lawsuit would result in any actual tax relief for respondents" were they to prevail. *Id.* And the taxpayer respondents have not even attempted to show that the asserted constitutional injury affected them "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

Indeed, even if respondents had alleged that the ITC visited a particularized economic injury upon them, this case is far afield even from those highly anomalous situations in which the Court has found that taxpayer standing might be appropriate. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 107 (1968). In *Flast*, as in the hypothetical in *Mellon* (*see* 262 U.S. at 486), the taxpayer's contention was "that his tax

money [was] being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast*, 392 U.S. at 106. Here, in contrast, respondents are not challenging any tax imposed on upon *them*; their argument is that *others* should be compelled to pay more. In such circumstances, respondents cannot make out the direct and "necessary nexus between [their] status [as taxpayers] and the nature of the allegedly unconstitutional action to support [their] claim of standing." *Id.* at 106 (majority opinion). This reinforces the general rule of *Doremus* and *Mellon*.[7] The Ohio taxpayers accordingly cannot make out a "'personal stake in the outcome of the controversy,'" and thus do not satisfy the requirements of Article III standing. *Warth*, 422 U.S. at 498 (citation omitted).[8]

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[7] Moreover, *Flast*'s applicability is almost certainly limited to the Establishment Clause context, as held by four Justices of the *Flast* Court. *See Flast*, 392 U.S. at 114 (Stewart, J., concurring) ("I understand [*Flast*] to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause"); *id.* at 116 (Fortas, J., concurring) ("The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause"); *Valley Forge Christian Coll.*, 454 U.S. at 507-08 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). *See also id.* at 514 (Stevens, J., dissenting) (expressing the "firm conclusion that the plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in [*Flast*]"). Where the Establishment Clause is concerned, the exaction of taxes in support of a religious institution is itself the constitutional injury. *See Flast*, 392 U.S. at 114 (Stewart, J., concurring) (recognizing the plaintiffs' "clear stake as taxpayers in assuring that they not be compelled to contribute even 'three pence . . . of [their] property for the support of any one [religious] establishment'" (citation omitted; ellipses in original)).

[8] The Michigan taxpayers' claims of standing are even more farfetched than their Ohio counterparts. In addition to all the defi-

### C. The Injuries Alleged By Kim's Auto Were Not Caused By Ohio's Enactment Of The ITC, And Cannot Be Redressed By The Relief Sought In The Complaint

The last respondent, Kim's Auto, claims direct injury because its property was "slated to be condemned by the City of Toledo and taken . . . to be conveyed to DaimlerChrysler in aid of the . . . Jeep plant project." J.A. 28a. Assuming that Kim's Auto has alleged a cognizable injury-in-fact, Kim's Auto nevertheless fails the causation and redressability requirements of Article III standing.

The causation element of Article III standing requires that the plaintiff's alleged injury "be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Here, whatever injury Kim's Auto might have suffered cannot be traced to Ohio's enactment of the ITC; Kim's Auto's injury rather was caused by the eminent domain proceeding initiated by the City of Toledo, and terminated in August 2004 when the City evicted Kim's Auto from the premises. *See Kim's Auto & Truck Serv., Inc. v. City of Toledo*, No.

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ciencies in the standing theory of the Ohio taxpayers detailed above, the Michigan taxpayers' claimed injuries—loss of "economic opportunities, in the form of jobs," and "tax revenues" for Michigan, "from which the Michigan Plaintiffs would have benefited" (J.A. 29a)—are not redressable by the injunctive and declaratory relief sought in the complaint. Whatever the result of this litigation, it cannot seriously be contested that the Stickney Avenue Jeep Plant will remain in Toledo, Ohio, and the economic opportunities of which the Michigan taxpayers claim they were deprived will remain out of reach. That is fatal to their claim of standing.

04A105 (U.S. Aug. 4, 2004) (Stevens, J.) (denying application for stay pending certiorari). The absence of causation is amply demonstrated by the fact that Kim's Auto alleges no injury as a result of the enactment of the ITC in 1995 or any subsequent application of the ITC except for that arising out of DaimlerChrysler's investments in the Stickney Avenue Jeep Plant. It is obvious enough from the face of respondents' complaint that, but for the City's eminent domain proceeding to take its property, Kim's Auto had no objection to (never mind an injury traceable to) DaimlerChrysler's use of the ITC. This demonstrates conclusively that Kim's Auto's injuries were not caused by Ohio's enactment or administration of the ITC.

Moreover, regardless of their cause, the ***economic*** injuries alleged by Kim's Auto are not redressable by the injunctive and declaratory relief sought in the complaint. The redressability requirement of Article III looks to "whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998) (quoting *Warth*, 422 U.S. at 517). Whatever the result of this litigation, Kim's Auto never stood to receive any benefit from it. The complaint did not seek to enjoin completion of the new plant, nor would an injunction against the awarding of tax credits to petitioner have achieved such an outcome. In any event, the property on which Kim's Auto once stood was seized last summer by the City of Toledo pursuant to its eminent domain power; Kim's Auto was compensated for that taking; and the Stickney Avenue Jeep Plant now stands where Kim's Auto once stood. The relief sought in the complaint, if granted, can change none of that. This Court thus should conclude that Kim's Auto also lacks Article III standing to challenge the ITC. *See Steel Co.*, 523 U.S. at 105-06 (finding standing to be lacking where "[n]one of the specific items of relief sought [in the complaint in this case], . . . would serve to reimburse respondent for losses caused by the [asserted consti-

tutional violation], or to eliminate any effects of that [violation] upon respondent").

With all respondents lacking Article III standing to challenge the ITC, this Court should vacate the decision below in relevant part and remand with instructions that respondents' federal challenges to the ITC be dismissed. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235-36 (1990).

## II. THE OHIO ITC DOES NOT VIOLATE THE COMMERCE CLAUSE

Employing a concededly "novel" theory of the dormant Commerce Clause, the court of appeals invalidated Ohio's ITC, which even respondents acknowledged was nothing more than a "subsidy" for investments in the State. J.A. 28a. Purporting to apply this Court's four-part test in *Complete Auto Transit*, 430 U.S. at 279, the court of appeals concluded that Ohio's ITC fails the third prong—*i.e.*, that Ohio's ITC "discriminate[s] against interstate commerce," and therefore violates the dormant Commerce Clause. Pet. App. 4a; *see id.* 11a. Analyzing the supposed discrimination, the Sixth Circuit accepted respondents' contention that "as between two businesses, otherwise similarly situated and each subject to Ohio taxation," the one-time subsidy offered by the Ohio ITC "coerc[es] businesses . . . to expand locally rather than out-of-state." *Id.* 6a. The supposed "coerci[on]" emanates from the fact that "the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.* The Sixth Circuit concluded that this subsidization of the Ohio tax burden on in-state investors worked "coerci[on]" on potential out-of-state investors because "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other

states," and "economically speaking, the effect of a tax benefit or burden is the same." *Id.* 6a, 9a, 10a.

The Sixth Circuit's reasoning sweeps so broadly that it would invalidate firmly established economic development policies in nearly every state in the Union and upset the investment-backed expectations of thousands of businesses that made—and continue to make—rational economic decisions in reliance on those policies. In striking down state laws that merely offer tax incentives to attract economic development, the reasoning adopted by the Sixth Circuit would unmoor the Commerce Clause from its central purpose—prohibiting protectionist tariffs that suppress competition—and it would require this Court to abandon its oft-repeated directions that "subsidization of domestic industry does not run afoul of [the Commerce Clause]," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988), and that nothing in that Clause "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336.

The Sixth Circuit's analysis ultimately founders on its own terms. Ohio does not place a financial burden on out-of-state capital investment. Rather, because Ohio's corporate franchise tax levies only against business value in Ohio, a corporation's out-of-state investment is essentially Ohio-tax-free. The court of appeals' discrimination analysis fails as well, because although Ohio's ITC unquestionably treats in-state and out-of-state investors differently, the two are not similarly situated vis-à-vis Ohio's corporate franchise tax, which applies to the in-state portion of a business's activity and presence. Indeed, the decision below ultimately raises its own constitutional problems. The position advocated by respondents not only would undermine our federal system by limiting the flexibility of states to remedy problems peculiar to their geography and population, but also would trample upon other states' prerogatives *not* to encourage the kinds of capital investment promoted by Ohio's ITC.

### A. The Commerce Clause Protects Commerce From Protectionist State Laws That Suppress Competition

The Commerce Clause empowers Congress "To regulate Commerce with foreign Nations, and among the several States." U.S. Const. Art. I, § 8, cl. 3. The Framers created this Clause principally to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979), and thereby to ensure that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them," *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (Jackson, J.). *See also* The Federalist Nos. 42 (James Madison), 7, 11 (Alexander Hamilton); Gerald Gunther & Kathleen Sullivan, *Constitutional Law* 141 (13th ed. 1997) ("the national commerce power, it was hoped, would afford the means to end hostile state restrictions, retaliatory trade regulations, and protective tariffs on imports from other states"). The Court has long inferred from this historical purpose of preventing protectionist state legislation that, beyond authorizing congressional regulation of interstate commerce, the Commerce Clause also includes a negative or dormant aspect that, "by its own force and without national legislation, puts into the power of the Court to place limits on state authority." Felix Frankfurter, *The Commerce Clause Under Marshall, Taney & Waite* 18 (1937).

This Court has applied the dormant Commerce Clause to invalidate state regulations and taxation schemes that are deemed to "discriminate[] against or unduly burden[] interstate commerce and thereby 'imped[e] free private trade in the national marketplace.'" *Gen. Motors Corp.*, 519 U.S. at

287 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)). The "paradigmatic" violation "is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery*, 512 U.S. at 193. Although the Court has applied the Clause to many variations on that paradigm—for example, laws that tax "'a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State,'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)), or that "discourage domestic corporations from plying their trades in interstate commerce," *id.* at 333—it long has been settled that the Clause is concerned chiefly with the use of state authority "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *see, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism"); *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (acknowledging "common and correct interpretation of the Commerce Clause as primarily intended . . . to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide the basis for questioning a State's right to experiment with different incentives to business").

From its earliest cases, protectionist tariffs and tax regimes calibrated to the same protectionist ends have been the principal evil against which this Court's dormant Commerce Clause jurisprudence has been directed. Soon after it first recognized the Commerce Clause's negative aspect, the Court invalidated a Missouri law that required payment of a license fee to sell goods that "are not the growth, produce, or manufacture of the State" because such a fee "must add to

the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself." *Welton v. Missouri*, 91 U.S. 275, 278, 279 (1876). If the statute were upheld, "[i]mposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states and countries . . . might follow . . . from the action of some of the States." *Id.* at 281. Similarly, in 1880, the Court invalidated a Baltimore ordinance that imposed port fees for the wharfage of out-of-state goods, but not for Maryland-produced goods, holding that "the State could not . . . build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

This commitment to free trade among the several States and the accompanying hostility toward protective tariffs (and taxes and fees that function effectively as such) animates this Court's more recent dormant Commerce Clause decisions as well, including, critically, all the cases on which the court of appeals principally relied for its holding. In *Boston Stock Exchange*, the Court upheld the challenge of six regional stock exchanges and struck down New York's two-tier transfer tax that imposed a smaller tax on securities sales completed in New York than it imposed on identical transactions completed on out-of-state exchanges. 429 U.S. at 337. After specifically emphasizing that the legislative history revealed New York changed its once-unitary stock transfer tax into a two-tier system in order to protect the primacy of the New York Stock Exchange, *see id.* at 325-28, and that the switch to the two-tier tax was "necessary to '[retain] within the state of New York . . . sales involving large blocks of stock,'" *id.* at 334, the Court held the tax unconstitutional "[b]ecause [the tax] imposes a greater tax liability on out-of-state sales than on in-state sales." *Id.* at 332. The "obvious effect" of the additional burden placed on the out-of-state sales "[wa]s to

extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* at 331. The state tax thus operated in derogation of "the constitutional policy of free trade and competition" that led to the drafting of the Commerce Clause. *Id.* at 336.

The Court took a similar approach in *Maryland v. Louisiana*. In that case, the Court concluded that Louisiana's "first-use" tax on natural gas entering the State from the outer continental shelf (OCS), when coupled with a package of exemptions and credits available only to in-state gas users, operated effectively as a tariff against processing or end-use of gas out-of-state, and protective of Louisiana's gas users—the refining and energy production industries. *See* 451 U.S. at 733 ("Louisiana consumers of OCS gas for the most part are not burdened by the Tax, but it does apply uniformly apply to gas moving out of the State."). The Court held that Louisiana's tax package "unquestionably discriminates against interstate commerce in favor of local interests" because "[c]ompetitive users in other States are burdened with the Tax," while "Louisiana consumers of [OCS] gas are . . . substantially protected against the impact of the First-Use Tax." *Id.* at 756, 757.

In *Westinghouse*, the Court confronted an even more "pernicious" tax-and-credit regime—one that, because the credit depended upon the *ratio* of business conducted in-state to that conducted out-of-state, "penalize[d]" increased out-of-state commerce even when the amount of in-state business remained constant. 466 U.S. at 401 & n.9. The Court invalidated an amendment to New York's franchise tax statute that, in order to capture the income of certain federal-tax-exempt export subsidiaries (known as DISCs), required such income to be consolidated with the income of the parent company, and then assessed a franchise tax against the consolidated income. *Id.* at 392-93. In an effort to encourage these export entities to remain in New York despite the state tax on DISC income, New York also provided a partially offsetting tax

credit, the size of which depended on the proportion of the subsidiary's shipping activities conducted from New York. *Id.* More specifically, the credit grew as the subsidiary "move[d] a greater percentage of its shipping activities into the State of New York," and, because the credit was based on the *percentage* of business in New York (rather than the absolute amount), the tax credit also "penalize[d] increases in the [taxpayer's] shipping activities in other States." *Id.* at 400-01.

Westinghouse challenged the tax credit as discriminating against DISC export activities conducted out-of-state. *Id.* at 395-96. The acknowledged purpose of this "penal[ty]" on out-of-state commercial activity was "to ensure that New York would not lose its competitive position vis-à-vis other States." *Id.* at 397. The Court held that this violated the Commerce Clause's fundamental prohibition on "taxing measures that impose[] greater burdens on economic activities taking place outside the State than were placed on similar activities within the State," even when the purpose of such taxing measures is to "encourage[] the development of local industry." *Id.* at 404.

Finally, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court found unconstitutional a Hawaii statute that levied a 20 percent tax on all liquors sold in the State, but then exempted two locally-produced liquors. *Id.* at 273. Though it was framed as a measure to "encourage and promote the establishment of a new [Hawaiian liquor] industry," the tax nevertheless amounted to "simple economic protectionism." *Id.* at 270 (internal quotation marks omitted). The liquor tax-and-exemption scheme violated the Constitution because the end of local economic development was achieved by raising the cost of all liquors—in-state and out-of-state—and then exempting certain in-state products from that increase, in the hope that "drinkers of other alcoholic beverages might give up or consume less of their customary

drinks in favor of the exempted products because of the price differential that the exemption will permit." *Id.* at 269.

Beyond the fact that the tax scheme in every one of these cases had a manifestly protectionist *purpose*, each also functioned as a protectionist tariff in its operational *effect*, increasing the cost of doing business out-of-state or with out-of-state actors, and doing so in a discriminatory manner, *i.e.*, to a greater extent than it raised the cost of doing business in-state or with in-state actors. Indeed, it is in precisely these terms that this Court has defined "economic protectionism—that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *New Energy*, 486 U.S. at 273-74). This protectionist effect remains the central concern of this Court's dormant Commerce Clause jurisprudence.

The dormant Commerce Clause historically has not been implicated, however, by state actions that seek simply to encourage local economic development by reducing economic and non-economic costs of doing business in a particular state or locality. Thus this Court has never found occasion to question the constitutionality of direct subsidies to local business activity, *see, e.g.*, *New Energy*, 486 U.S. at 278, and such programs had been—until the decision below—universally upheld against Commerce Clause challenges in the courts of appeals. *See, e.g.*, *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206, 217 (1st Cir. 1994) (finding "alleged beneficial effect of [state law] is too far afield from the protectionism that the Commerce Clause prohibits"); *see also W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 494-95 (7th Cir. 1984) (discussing "freedom that states have under the Constitution to provide, often selectively, for the welfare of their residents" including "a thousand devices" to "subsidize the state's [local industry]"). Nor has it employed the Commerce Clause to "prevent the States from structuring their tax systems to encourage the growth and development of intra-

state commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336; *see also Caterpillar, Inc. v. Dep't of Treasury*, 488 N.W.2d 182, 193 (Mich. 1992) (upholding Michigan's "capital asset deduction," holding that "discriminatory effect does not result from fair encouragement of in-state business"). Rather, these types of business incentives are among the myriad "laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," that "a State may enact." *Bacchus Imps.*, 468 U.S. at 271.

### B. Ohio's ITC Neither Burdens Interstate Commerce Nor Discriminates Against Out-Of-State Actors

Ohio's ITC—conceded by respondents to be merely a "subsidy," J.A. 28a—suffers from none of the flaws that doomed other taxation schemes challenged in this Court's dormant Commerce Clause cases. Before a state taxation regime may trigger dormant Commerce Clause scrutiny, it must, at an irreducible minimum, fix a burden on interstate commerce, which is to say, on transactions occurring out-of-state or with out-of-state actors. Unlike those cases in which this Court has invalidated state taxes, though, Ohio's corporate franchise tax does not place a burden on the out-of-state conduct that is the subject of respondents' discrimination claims, *i.e.*, acts of capital investment made outside Ohio. Indeed, far from increasing a corporation's Ohio franchise tax burden, out-of-state investments generally have the effect of reducing a corporation's Ohio franchise tax rate. Thus, Ohio's ITC functions exclusively as a subsidy to those businesses that choose to increase in-state capital investment. It therefore should be upheld as a proper exercise of Ohio's power to secure the health and welfare of its citizens.

Even if Ohio's franchise tax, when coupled with the ITC, could be viewed as a regulatory measure that burdens interstate commerce, it easily survives dormant Commerce Clause

scrutiny. Contrary to the Sixth Circuit's conclusion, Ohio's ITC does not unlawfully discriminate against interstate commerce. A finding of discrimination necessarily implies a comparison of two similarly situated entities. Although Ohio's ITC concededly differentiates between in-state and out-of-state investments, corporations that invest in Ohio and corporations that invest outside of Ohio are not similarly situated in relation to Ohio's corporate franchise tax (against which the ITC acts as a credit). Corporations that invest capital in Ohio do so at the expense of increasing their effective franchise tax rate; corporations that invest elsewhere generally ***reduce*** their Ohio franchise tax burden. There is nothing pernicious or discriminatory about awarding an offsetting credit to (*i.e.*, subsidizing) only those parties that have elected to increase their franchise tax liability to the State.

### *1. Ohio's Franchise Tax And ITC Do Not Place Any Burden On Out-Of-State Capital Investment*

As this Court has recognized, "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 591 (1997) (quoting *New Energy*, 486 U.S. at 278) (emphasis in original). Accordingly, this Court has held that nothing in the dormant Commerce Clause "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336; *see also Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991) (it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State"); *see also Hughes*, 426 U.S. at 816 (Stevens, J., concurring) ("Nor, in my judgment, does [the Commerce] Clause inhibit a State's power to experiment with different methods of encouraging

local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."). Therefore, when a generally applicable, one-time credit against taxation on in-state activity operates as a subsidy to local business activity—"impos[ing] no burden on interstate commerce, but merely assist[ing] local business"—it cannot be said to transgress the dormant Commerce Clause's limitations on state authority. *West Lynn Creamery*, 512 U.S. at 199. Rather, such tax benefits are classic exercises of the States' police power. *See Bacchus Imps.*, 468 U.S. at 271.[9]

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[9] The Sixth Circuit apparently assumed that Ohio's decision to subsidize in-state economic development through a tax credit, as opposed to a direct appropriation, itself made the state action an exercise of *regulatory* power over interstate commerce. *See* Pet. App. 10a ("Thus, the distinction between a subsidy and a tax credit, in the constitutional sense, results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax."). This is manifestly incorrect. First, it flatly contradicts respondents' own acknowledgement in their complaint that the ITC is, in fact, a "subsidy." J.A. 28a. Moreover, it is not the exercise of the power to tax that makes a state action regulatory in nature. A state *regulates* interstate commerce only when it places regulatory or financial *burdens* on interstate commerce. *See New Energy*, 486 U.S. at 273-74 (Commerce Clause prohibits state "*regulatory* measures designed to benefit in-state economic interests by *burdening* out-of-state competitors") (emphasis added). Thus, the "constitutionally significant difference between subsidies and tax exemptions" that the Court found in *Camps Newfound*, 520 U.S. at 590, necessarily dissipates either when a subsidy program places financial burdens on out-of-state actors (*i.e.*, when it regulates interstate commerce), *see West Lynn Creamery*, 512 U.S. at 202-04, or, as in this case, when the tax program places no such burden on out-of-state actors, and therefore cannot be said to regulate interstate commerce.

A state tax thus triggers dormant Commerce Clause scrutiny only when it imposes a burden on interstate commerce by imposing a cost on the conduct of business out-of-state or with out-of-state actors. Once it is established that the state tax actually burdens interstate commerce, a court then may invalidate the tax (either the tax alone, or in combination with a credit or exemption) if it determines that the tax burdens interstate commerce in a discriminatory manner. *See Granholm*, 125 S. Ct. at 1895 ("state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)); *Fulton Corp.*, 516 U.S. at 330 ("In its negative aspect, the Commerce Clause 'prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" (quoting *Lohman*, 511 U.S. at 647)). That the underlying state tax burdens interstate commerce is therefore a prerequisite for discrimination analysis under the dormant Commerce Clause.

Respondents' central contention is that, because Ohio awards the ITC only for the placement of machinery and equipment within Ohio, its franchise tax unconstitutionally burdens decisions to invest out-of-state. *See* Opp. 10-11; *see also* Pet. App. 6a (deeming invalid "tax schemes that . . . impos[e] greater burdens on economic activity taking place outside the state"). This contention lacks merit. As this Court has recognized, a franchise tax is simply a "tax on the income of a business from its aggregated business transactions." *Westinghouse Elec. Corp.*, 466 U.S. at 404. The relevant transaction here—the transaction respondents claim is unlawfully affected by Ohio's tax-and-credit scheme—is a corporation's investment of capital out-of-state. Ohio's franchise tax, however, does not levy upon that out-of-state transaction. Although the ITC certainly reduces the cost of capital investments within Ohio—indeed, that is precisely its

point—Ohio's franchise tax itself does not increase the cost of out-of-state investments. Far from increasing the cost of investing out-of-state, a corporation's decision to invest outside of Ohio will reduce its effective Ohio tax rate, and thus, typically, the amount due.

Ohio's franchise tax is levied against only that portion of "the corporation's net income," during the year in question, that is "allocated or apportioned to" Ohio (or, in some cases, the "net book value of the corporation's assets," also as apportioned to the State).[10] O.R.C. § 5733.05(B) & (C)(1). The apportionment of a corporation's business income is determined pursuant to a formula whereby a corporation's personal property value, payroll, and sales in Ohio are compared against the corporation's worldwide personal property value, payroll, and sales. *See id.* § 5733.05(B)(2)(a)-(c). The calculation therefore yields three in-state to out-of-state ratios, the weighted average of which constitutes the Ohio apportionment value.[11] The corporation's net business income (or net book value) is multiplied by the apportionment value to determine the amount apportioned to Ohio for taxation purposes. In short, the franchise tax is based on the corpora-

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[10] Within the meaning of Ohio's franchise tax statute, "allocation" refers to the "attribution to a particular jurisdiction of income from a given source, usually because the asset that is the source of that income is located in that jurisdiction," while "[a]pportionment" involves "divid[ing] income from interstate activity that is not allocated to a definite situs." *Wesnovtek Corp. v. Wilkins*, 825 N.E.2d 1099, 1100 (Ohio 2005). Under Ohio's franchise tax statute, "business income" is apportioned while "nonbusiness income"—income from rental or sale of assets—is allocated. *See* O.R.C. §§ 5733.05(B), 5733.051.

[11] In determining the apportionment value, the sales factor is weighted three times as much as the property and payroll factors. *See* O.R.C. § 5733.05(B)(2).

tion's Ohio-related business activity.[12] Because capital investment outside the State will reduce the in-state property and payroll factors used in calculating the Ohio apportionment value, the percentage of a business's net income (or net book value) allocated to Ohio will be reduced by any out-of-state investments. Thus, for the corporation that decides to build its plant out-of-state, the percentage of its income allocated to Ohio for tax purposes will decline. Ohio's franchise tax therefore does not impose a cost on the choice to locate new investment elsewhere; in fact, that business's effective franchise tax rate is reduced from its level prior to the out-of-state investment. Nor does Ohio disadvantage a business on account of an increase in the ratio of out-of-state to in-state activity or presence. The credit depends not on the percentage of investment in Ohio, but on the absolute dollar amount. Thus, a business need not worry that new investment outside Ohio will have any effect other than the lost opportunity to take advantage of the subsidy Ohio offers in the form of a tax credit for in-state investment.

Despite the fact that the franchise tax itself does not apply to out-of-state capital investments, the Sixth Circuit nevertheless concluded that Ohio's failure to confer the ITC's subsidy on corporations investing capital out-of-state itself constitutes a burden on out-of-state investment. Quoting this Court's decision in *Bacchus Imports*, the court of appeals stated that every "statute that allocates benefits or burdens unequally . . . can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense." Pet. App. 10a (quoting 468 U.S. at 273). The court thus concluded that "economically speaking the effect of a tax burden

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[12] Ohio assesses against the corporation the greater of the sum of 5.1 percent of the first $50,000 of Ohio-allocated income and 8.5 percent of the remaining Ohio-allocated net income in excess of $50,000, or 0.04 percent of the Ohio-allocated net book value. *See id.* § 5733.06(A)-(C).

or benefit is the same." Pet. App. 10a. Respondents also adopt this position that every benefit rewarding in-state activity imposes a corresponding reflexive burden on interstate commerce. *See* Opp. 11.

Only by obliterating this distinction between benefits for in-state investment and burdens on interstate conduct could the ITC be invalidated. This Court, however, has never construed the notion of a "burden" on interstate commerce so broadly. Indeed, if respondents were correct every manner of "benefit" that local governments extend to the business community in order to encourage investment would have to be struck down on the ground that it creates a corresponding "burden" on investment elsewhere. At risk, under respondents' view, would be not just cash subsidies, but also infrastructure improvements, and even perhaps vocational training programs that result in a more highly skilled workforce—***none*** of which has ever been determined by ***any*** court to implicate, let alone violate, the dormant Commerce Clause.

Instead of extending the dormant Commerce Clause so broadly, this Court has invalidated state tax-and-exemption or tax-and-credit schemes only where the underlying state tax reached—and as a result burdened—interstate transactions against which the state's tax exemption or credit supposedly discriminated. In *Bacchus Imports*, sales of liquor manufactured out-of-state were subject to a 20 percent excise tax, from which locally-produced liquors were completely exempted. *See* 468 U.S. at 265. In *Maryland v. Louisiana*, all gas transported from the outer continental shelf through Louisiana on its way out-of-state was subject to Louisiana's "first-use" tax, but Louisiana users of OCS gas were exempted or received offsetting credits. *See* 451 U.S. at 733 ("Louisiana consumers of OCS gas for the most part are not burdened by the tax, but it uniformly applies to gas moving out of the State."). In *Boston Stock Exchange*, New York's transfer tax applied to all sales of securities having a nexus to New York, including those where the sale occurred on an

out-of-state exchange, but sales completed on the New York exchange were subject to a substantially lower rate of taxation. *See* 429 U.S. at 329. Similarly, in *West Lynn Creamery* the "premium payment" to the Massachusetts Dairy Equalization Board applied to all Massachusetts milk "dealers," including those that produced milk out-of-state, while those premium payments were rebated solely to Massachusetts "milk producers." 512 U.S. at 190-91. And in *Camps Newfound/Owatonna*, Maine's property tax applied to all property owners, including not-for-profit entities that served a principally out-of-state clientele. *See* 520 U.S. at 568-69.

Finally, in *Westinghouse Electric*, which addressed a challenge to a franchise tax and credit, the state tax applied to interstate conduct. *See* 466 U.S. at 393. As the New York franchise tax statute required consolidation of the income of the export subsidiary with that of the parent entity, the tax was levied (to the extent permitted by New York's business income allocation formula) against out-of-state income-producing DISC transactions that Westinghouse claimed were discriminatorily burdened by the New York credit.[13] In

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[13] Changing the assumptions used in the Court's hypothetical examples, *see Westinghouse Elec.*, 466 U.S. at 400-02 n.9, illustrates this point. The Court's examples assume that the ratio between the parent company's income and the DISC entity's income (20:1 in Table B) will be the same as the ratio of the parent's property to the DISC's property, and the parent's payroll to the DISC's payroll. Taking Table B, and the hypothetical in which 40 percent of the parent's income of $10,000 is allocated to New York and 50 percent of DISC income of $500 is generated in New York: if instead of 20:1, the parent-to-DISC property and payroll ratios were 2:1, the New York income allocation percentage would increase from 40.48 percent to 42.38 percent. Under these circumstances, $4,450 of the consolidated income of $10,500—including $450 of the DISC income of $500—would be taxed by New York. Under that scenario, the New York franchise tax significantly increased the cost of, and thereby burdened, out-of-state DISC transactions.

fact, New York's effort to defend its statute on the ground that it ensured the credit would apply only to DISC income "taxable by the State of New York" foundered on the peculiar mechanics of that credit, which made an "inaccurate and duplicative" second adjustment based on the in-state to out-of-state ratio, thereby imposing a greater burden on exports that originated in states other than New York. 466 U.S. at 399.

The fact of the matter is that the Ohio ITC—unlike any of the provisions this Court has struck down—is a one-time financial incentive for businesses to make a new capital investment. Like a new road or improved infrastructure at or near a construction site, it reduces the cost of that investment to the business and permits Ohio to compete vigorously with other states and with foreign countries for new plants and equipment. To invalidate the ITC would be to rule that such benefits are really unconstitutional burdens on corporations given the choice whether to take advantage of them.

This Court's precedents, as just summarized, go nowhere near that extreme. Not surprisingly, respondents point to no case—in 130 years of dormant Commerce Clause jurisprudence—in which this Court invalidated a state taxation regime where the tax did not, at a minimum, levy against interstate transactions alleged to be prejudiced. In all of those cases, the states levied taxes upon interstate transactions or on transactions with out-of-state actors, with the direct effect of increasing the cost of doing business interstate. Not so here. Respondents thus ask this Court to hold for the first time that conferral of a tax benefit—as respondents concede, a subsidy—on domestic industry *itself* fixes a burden on interstate commerce.

The Sixth Circuit's ruling that a benefit conferred on local business activity imposes a corresponding burden on interstate commerce would work a sea change in this Court's dormant Commerce Clause jurisprudence. It would surely

condemn any effort by states to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. Indeed, it threatens to eliminate a state's "police powers" to advance the health and welfare of its citizens by "enact[ing] laws . . . that have the purpose and effect of encouraging domestic industry." *Bacchus Imps.*, 468 U.S. at 271. If respondents are correct, there is no principled basis upon which even a direct appropriation to local business activity—financing the construction of a baseball stadium, perhaps—could pass constitutional muster.

### 2. *Ohio's ITC Is Granted On A Non-Discriminatory Basis*

Within the subset of state taxation regimes that actually impose burdens on interstate commerce, taxes will be sustained against a dormant Commerce Clause challenge if (1) the activity taxed has a substantial nexus with the taxing state; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the state; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state. *See Complete Auto Transit, Inc.*, 430 U.S. at 277-78. The court of appeals determined that Ohio's ITC violates the third prong of this test, *i.e.*, that it discriminates against interstate commerce.[14] *See* Pet. App. 4a-11a. It observed that "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." Pet. App. 6a.

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[14] Respondents had conceded that Ohio's ITC satisfied all other requirements set out in *Complete Auto Transit*. Pet. App. 4a.

The Sixth Circuit's discrimination analysis is deeply flawed. The hallmark of discrimination is treating similarly situated persons or things differently. *See Gen. Motors Corp.*, 519 U.S. at 298 ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."); *see also, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (condemning under the Fourteenth Amendment "illegal discriminations between persons in similar circumstances"). A state thus discriminates against interstate commerce when, for example, (1) residents and non-residents who engage in substantially similar transactions are taxed at different rates, *see, e.g., Boston Stock Exch.*, 429 U.S. at 330-32, or (2) similarly situated businesses engage in similar transactions, and the state taxes the interstate transactions at a higher effective rate than it does the intrastate transactions, *see, e.g., Maryland v. Louisiana*, 451 U.S. at 757-58. "[W]hether the companies are indeed similarly situated for constitutional purposes," however, remains the "threshold question" to the discrimination analysis. *Gen. Motors Corp.*, 519 U.S. at 299.

Even if identical in all other respects, a corporation that invests in Ohio and a corporation that invests outside of Ohio are not similarly situated. More specifically, the ITC operates only as a credit against Ohio's corporate franchise tax, and in-state investors and out-of-state investors are not similarly situated vis-à-vis that franchise tax. This is amply demonstrated by the hypothetical scenario of two identical start-up ventures, one that locates its machinery and equipment in Ohio and one that locates its operations in another state. In this scenario, the startup venture that locates in Ohio will be subject to Ohio's franchise tax; the business that locates in another state will not.

It is this obvious deficiency in respondents' legal theory that presumably led to the court of appeals' odd limitation of its holding to businesses already "subject to Ohio taxation." Pet. App. 6a. Even among the subset of businesses already

subject to Ohio's franchise tax, however, in-state and out-of-state investors are not similarly situated because businesses choosing to expand their Ohio presence will also incur an increased Ohio franchise tax basis due to that expanded presence. The new property itself, as well as the likely increase in payroll for jobs added as a result of the new capital investment, enlarges the percentage of business income apportioned to Ohio to which the franchise tax rate is applied. Conversely, a business that invests outside of Ohio will reduce its apportionment of income to Ohio and consequently will be taxed at a lower effective rate. In-state and out-of-state investors thus are not similarly situated vis-à-vis Ohio's franchise tax.

Even if in-state and out-of-state investors could be construed as similarly situated, the court of appeals erred in concluding that in-state and out-of-state investors are differently treated. This error flowed from the court of appeals' failure to take into account the full economic effect of a business's decision regarding where to locate additional machinery and equipment. When the *full* array of in-state and out-of-state investment options are considered, the result is that Ohio's credit does not impose a discriminatory burden on interstate commerce. Any business choosing to expand its presence in a location *other than* Ohio will be subject to that locale's tax on business activity (if any) and may also be eligible for a tax credit under local law. Whether the out-of-state investor's overall tax burden is greater or smaller than that of the in-state investor is entirely dependent on whether other states choose to compete with Ohio by offering their own incentives, through lower tax rates, tax credits or some other financial inducement.[15] So while Ohio itself may treat in-state

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[15] Ohio's decision to attract capital investment with a one-time tax credit does not impede the ability of other states to compete for such investment with incentive packages most suitable to those states. For example, another state could offer the same type

and out-of-state investors differently, the out-of-state investor can avoid any potential effect of that different treatment by taking advantage of comparable investment incentives offered elsewhere. Thus, Ohio's tax credit does not necessarily favor in-state investors over out-of-state investors, even though the two are not similarly situated. As respondents challenge Ohio's ITC statute on its face, it is their burden to demonstrate that the ITC is always discriminatory. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

This ability of businesses to compare the Ohio ITC to inducements offered by other states is an essential part of the discrimination calculus that the Sixth Circuit's analysis utterly ignores. As this Court has recognized in applying the dormant Commerce Clause, it is entirely appropriate to consider how a provision such as the ITC operates in the context of other states' laws. *Cf. Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (applying "internal consistency" test and inquiring whether "imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear"); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (noting that "the practical effect of the statute must be evaluated . . . by considering . . . what effect would arise if not one, but many or every, State adopted

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of tax credit, a permanently lower franchise tax rate (including no tax at all), or any mix of subsidies, infrastructure improvements, general economic conditions or "quality of life" inducements. The business deciding where to locate new capital investment will take all of the economic effects of each option into consideration, ensuring that the benefits of competition between the several States are fully realized.

similar legislation"); *Scheiner*, 483 U.S. at 282-83 (noting that registration fee "has its counterpart in every other State" and that "the Commerce Clause is not offended when state boundaries are economically irrelevant"). Here, because nearly every state has tax incentives comparable to Ohio's, the result is lower tax burdens for all investments and the free flow of commerce across state lines in a highly competitive marketplace—hardly the barrier to interstate commerce or Balkanization traditionally thought to be the concern of the Commerce Clause. Even if no other state offered incentives to investment similar to the ITC the principal effect of the ITC would be to encourage businesses to invest for the first time in Ohio—that is, to engage in interstate, rather than intrastate commerce.[16]

The fact that states have the ability to compete with one another by offering their own tax credits and other inducements means that no business is "coerce[d]" to place its machinery or equipment in Ohio. Nor are businesses that face the type of investment decision made by DaimlerChrysler "pinch[ed]" or "squeeze[d]" by Ohio's system of credits. *Camps Newfound*, 520 U.S. at 573-74 ("Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." (citations and internal quotation marks omitted)). Rather, a business that chooses Ohio for economic reasons does so because Ohio's financial incentives are better than those of competing locales. Therefore, to determine if Ohio's ITC improperly discriminates, it makes no sense to compare the business that invests in Ohio with a business that locates elsewhere. The latter will subject

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[16] The ITC is especially attractive to out-of-state companies that have never made a capital investment in Ohio, because they will always meet its requirement of increasing investment over prior years' levels.

its increased business activity to a different state's taxation and credit formula.

Finally, in concluding that Ohio's ITC is awarded on a discriminatory basis, the Sixth Circuit failed to compare all businesses that can qualify for the credit. Ohio treats equally any company willing to pump additional investment into Ohio, regardless of where the company is domiciled, regardless of whether it has invested in Ohio in the past, and regardless of its other activity outside the State of Ohio. If the company chooses not to locate its investment in Ohio, it merely loses the opportunity to earn a subsidy for doing business in that State. It is this feature that distinguishes the Ohio tax credit from the provisions struck down in *Boston Stock Exchange*, *Maryland v. Louisiana*, and *Westinghouse*. As noted earlier, in each of those cases, the state impermissibly used its taxing scheme to give an advantage to business activity conducted locally by imposing a discriminatory tax burden on those taxpayers who engaged in a greater proportion of activity out-of-state.

### C. The Sixth Circuit's Ruling Unduly Interferes With The Federal System In Which States May Exercise Different Prerogatives And Policy Choices

The Sixth Circuit's novel and expansive interpretation of the dormant Commerce Clause comes at a high price. Principles of federalism, not to mention those underlying the Commerce Clause itself, demand that states be given great flexibility in devising the most effective methods to compete with one another for capital investment. Adopting the lower court's interpretation, as advocated by respondents, would discourage innovation and do violence to "the values of federalism which have long animated [this Court's] constitutional jurisprudence." *West Lynn Creamery*, 512 U.S. at 217 (Rehnquist, C.J., dissenting). Such a ruling would also *con-*

*flict* with this Court's Commerce Clause rulings by creating a framework where states may use tax breaks to stimulate investment only if they are willing to encroach on the prerogatives and policy choices of other states.

The dormant Commerce Clause doctrine "reflect[s] basic principles of federalism." Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 260 (2002). In pronouncing the Commerce Clause's proper effect and reach, courts must maintain a sensitivity for the federalist principles that inform it. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 703 (1999) (Breyer, J., dissenting) ("Federalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world. Courts can remain sensitive to these needs when they interpret statutes and apply constitutional provisions, for example, the dormant Commerce Clause."). Thus, this Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995); *see also Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) ("Because state legislatures must draw some distinctions in light of 'local needs,' they have considerable discretion in formulating tax policy.").

The court of appeals' construction of the dormant Commerce Clause undercuts one of the greatest benefits of our federal system—the ability of states to experiment with varying approaches as they devise a mix of tools, tailored to unique local circumstances, for attracting new investment and improving the local economic climate. The ability of each state to devise its own tax structure and corresponding incentives to stimulate development is an example of what Justice Brandeis identified as a "one of the happy incidents of the federal system." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That is, a

state may "experiment[] in things . . . economic" through novel regulation, like the ITC. *Id.* And the benefits derived may extend beyond the borders of the individual state: "Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest." *EEOC v. Wyoming*, 460 U.S. 226, 265 (1983) (Burger, C.J., dissenting); *see also Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'").

It should come as no surprise that differences between the States in areas such as infrastructure development, tax base, natural resources, wage structure, and labor pool skills—just to name a few—translate into different approaches to attracting investment. For instance, states with a well-developed infrastructure and skilled workforce, but higher operating costs, may place a greater emphasis on tax credits than states with poorly developed infrastructure and relatively unskilled labor. *See* Br. of the Int'l Workers of Am., UAW as *Amicus Curiae* in Supp. of Pet. for a Writ of Cert., *DaimlerChrysler Corp. v. Cuno*, No. 04-1704 (U.S. July 15, 2005). That states have found it necessary to rely on different tools to different degrees as they compete for business development is hardly a novel phenomenon. *See Avery v. Midland County*, 390 U.S. 474, 485 (1968) ("The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."). Yet, the Sixth Circuit's ruling threatens this fundamental federalist principle.

Although the Sixth Circuit found it troubling that Ohio does not confer a benefit on any party that increases its capital investment outside of Ohio's territorial jurisdiction, *see*

Pet. App. 6a, Ohio's particular concern for investment in its own industries is a *positive* feature of the federal system. "Viewed as a whole, [this Court's] jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances." *Kelo v. City of New London*, 125 S. Ct. 2655, 2664 (2005). The interests of Ohio in spurring investment in manufacturing might not be shared—and most likely would not be shared to the same degree—by each of the other 49 States. These variations in policies and priorities are appropriately given force through the varying tax codes of the 50 States.

Taking up the Sixth Circuit's implicit suggestion that Ohio could cure the ITC's alleged constitutional deficiency by rewarding and, thereby spurring, industrial investment in other states, it is readily apparent that such a scheme would run counter to these federalist principles as well as the dormant Commerce Clause's underlying purpose. The Sixth Circuit's approach greatly increases the risk that one state will interfere with the priorities and policies of other states. Indeed, if Ohio must equally reward investment regardless of where that investment occurs, such encouragement would come at the expense of the prerogatives of its sister states. Such a tax credit, granted to Ohio corporations for investment in other states, would *directly* lower the price of new plant construction in those states. This trespasses on other states' sovereignty and might even run counter to their various policy objectives. For instance, some states might harbor particular socio-economic or environmental concerns that make new plant construction undesirable.

This Court has declared that "no single State . . . [can] impose its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996); *see also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particu-

lar."). This Court underscored this principle in enforcing the Commerce Clause in *Healy v. The Beer Institute*, 491 U.S. 324 (1989): "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) ("While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States." (quoting *Baldwin*, 294 U.S. at 521)).

The dormant Commerce Clause limits a state's powers of economic regulation to activities occurring within its own borders. This ensures not only that each state remains the master of its economic affairs, but also affords it the flexibility to tailor economic development policies to local needs. The Sixth Circuit's contrary ruling injures the federal system and the values of federalism that animate dormant Commerce Clause jurisprudence.

## CONCLUSION

The judgment of the court of appeals should be vacated in relevant part and the case should be remanded with instructions that the respondents' federal challenges to Ohio's ITC be dismissed. Should the court reach the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
# Supreme Court of the United States

DAIMLERCHRYSLER CORP.,

*Petitioner,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

AND

WILLIAM W. WILKINS, Tax Commissioner etc., et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

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## INTRODUCTION

Recent years have seen a rapid proliferation of state and local tax breaks targeted to businesses that agree to locate in the state or locality. Ohio's two tax provisions that are challenged in this case, an investment tax credit against its corporate franchise tax and an exemption from personal property taxes for businesses that commit to specified local levels of investment and employment, are characteristic examples of this national trend. To the limited extent that such tax breaks actually affect business location decisions, they distort the free flow of investment in an open national economy. In fact, they only have minimal impacts on business decisions, largely because most jurisdictions offer comparable breaks. Nonetheless, they impose high costs on states and localities in lost tax revenues. The states are caught in a classic prisoners' dilemma which leaves all of them, their citizens who pay taxes and depend on services, and the national economy, all worse off.

This trend is the most recent iteration of one of the dangers that led to the enactment of the Commerce Clause. From experience with interstate trade rivalries under the Articles of Confederation, the Framers recognized the need for national controls so that the states would not seek to improve their parochial positions by taxation and regulation that advantaged in-state economic activity. Respondents seek to enforce this basic constitutional constraint on state taxation and to protect themselves and others from the injuries flowing from the states' escalating rivalry to enact discriminatory tax preferences favoring in-state business location. By upholding the Sixth Circuit, this Court can reaffirm its longstanding prohibition against discriminatory state taxation and guide state tax policy away from this most recent slide toward "economic Balkanization." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

## STATEMENT OF THE CASE

Respondents filed this Commerce Clause challenge in the Ohio state courts in March, 2000, against two tax incentive programs used by Ohio and the City of Toledo to induce DaimlerChrysler ("Daimler") to build a new Jeep assembly plant in Toledo, where the old plant had also been. *See* Compl., Joint Appendix ("J.A.") at 24a, 29a. One incentive is a ten-year exemption from personal property taxes levied by Toledo and the school districts in which the plant is located, an exemption that was conditioned on the company agreeing to provide specified levels of jobs and investment at the plant. The other incentive is an investment tax credit ("ITC") against Ohio's corporate franchise tax, an income tax levied on the fraction of a corporation's net income that is apportioned to Ohio based on the percentages of the corporation's property, payroll and sales that are situated in Ohio.[1] The ITC reduces this tax based on a corporation's qualifying investment in machinery and equipment installed in Ohio, and thereby discriminates in favor of businesses locating new investment in the state and against those locating elsewhere.[2]

These two tax breaks are costing the state, the city, and the school districts many millions of dollars in lost revenues. In the Daimler agreement alone, they were the primary elements of a $280 million incentives package.

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[1] Ohio's statutory apportionment formula deviates from the traditional three-factor formula by assigning the sales factor three times the weight of the other factors. *See* Br. for Pet'r Ohio ("St. Br.") 7.

[2] As is noted in St. Br. 6 n.3, Ohio's statute providing for its ITC has been recently amended, *see* Ohio Rev. Code Ann. ("O.R.C.") § 5733.33(B)(1), as amended by 2005 Ohio Laws 28 § 101.02, but Respondents agree with the State that the replacement provision, O.R.C. § 122.173, continues to provide Daimler and other beneficiaries of the ITC with tax breaks that are, for purposes of constitutional analysis, functionally equivalent.

*See* App. to Pet. for Writ of Cert., *DaimlerChrysler Corp. v. Cuno*, No. 04-1704 ("Pet. App.") at 2a. Ohio estimates that its ITC causes a revenue loss of more than $120 million annually, *see* State of Ohio, Exec. Budget, Fiscal Yrs. 2006 & 2007, Bk. Two – Tax Expenditure Budget 26 (Feb. 2005), and the losses from any particular project extend for seven to ten years. St. Br. 9. The property tax exemption program was estimated to cause annual revenue losses of $13.7 million for the Toledo school district alone, seriously impairing the district's ability to fulfill its educational mission. Robert Tomsho, *In Toledo, A Tension Between School Funds and Business Breaks*, WALL ST. J., July 18, 2001, at A1. Statewide, the property tax exemption costs school districts more than $100 million annually. National Educ. Ass'n, Protecting Public Education From Tax Giveaways to Corporations 19 (2003). These lost revenues significantly deplete the state and local resources to which Respondents contribute through their own taxes and on which they rely for essential services.[3]

In the interstate competition for business, most other states have adopted similar tax breaks, and the cumulative costs nationally are staggering. Despite overwhelming empirical evidence for the limited efficacy of such incentives,[4] some 37 states have adopted ITCs similar to Ohio's.

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[3] As is detailed below, a portion of Ohio's corporate franchise tax is automatically distributed, by statutory formula, to local governments. Hence, Ohio's ITC directly depletes the resources of both state and local governments.

[4] *See, e.g.*, Ohio Economic Development Study Advisory Committee, *An Assessment of the Costs, Benefits, and Overall Impact of the State of Ohio's Economic Development Programs, Final Report* 171 (May 1999) (finding that Ohio's ITC "had little positive impact on the Ohio economy as measured in terms of jobs, gross state product, and personal income"); California Legislative Analyst's Office, *An Overview of California's Manufacturers' Investment Credit* 11 (Oct. 2002) (similar);

(Continued on following page)

*See* Pet. for Writ of Cert., *Wilkins v. Cuno*, No. 04-1724 ("St. Pet.") 22 n.5. The annual cost of these ITCs in the handful of states for which estimates are available comes to $844 million. *Id.* at 25. Likewise, virtually every state offers targeted property tax exemptions for businesses, many of which, like Ohio's, are conditioned on specified levels of in-state investment or employment;[5] the annual cost of just one state's exemption program will exceed $400 million by 2008, *see* Tex. Tax Expenditure and Incidence Report 2005-2007, Table 1 at 36 (2003). The inevitable result is a significant shift of the costs of state and local government to other classes of taxpayers, like Respondents, and a substantial reduction in states' and localities' ability to deliver important public services. *See, e.g.*, Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 2002 ST. TAX TODAY 42-1 (March 4, 2002).

Respondents include individual and small business taxpayers from Toledo. *See* Compl., J.A. at 18a-19a. They brought suit in the Ohio state courts, and Petitioners removed the case to the Northern District of Ohio. Respondents promptly moved to remand, largely because they were concerned that the federal courts might find they lacked standing. In particular, they feared the prospect of extended litigation on the merits of their claims in the federal courts, only to be told, years later, that they must start over in state court. *See* Pl. Reply in Supp. of Mot. to Remand 10 (July 27, 2000). Respondents argued that the district court should remand the case to the Ohio state courts, where the rules for citizen/taxpayer standing

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*see generally* ROBERT G. LYNCH, RETHINKING GROWTH STRATEGIES 25-36 (2004).

[5] *See* Esteban G. Dalehite, et al., *Variation in Property Tax Abatement Programs Among States*, 19 ECON. DEV. Q. 157 (2005); National Educ. Ass'n, *supra*, at 11.

are less restrictive.[6] Petitioners argued in response that "plaintiffs *do* have standing to proceed in federal court," on the very theories that they attack in their present briefs. Daimler Mem. in Opp. to Pl. Mot. to Remand 14 (July 17, 2000) (emphasis in original). In November 2000, the court denied the motion to remand, finding that the court had jurisdiction over Respondents' claims under principles of municipal taxpayer standing. *See* J.A. at 78a (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

Over the next four years, as the lower courts addressed the merits, the issue of standing was not raised again by either Petitioners or any judge. In August 2001, the district court granted Petitioners' motions to dismiss the complaint, concluding that neither challenged tax break discriminated between in-state and out-of-state activity in a manner that violated the Commerce Clause. Respondents appealed, and in October 2004 the Sixth Circuit reversed the decision on the constitutionality of Ohio's ITC, but affirmed the ruling on the property tax exemption. About the ITC, the court of appeals reasoned, by analogy to a long line of Supreme Court cases, that the state, by granting tax credits to businesses that are subject to Ohio's franchise tax if they locate new economic activity at sites in Ohio while denying the credits to identically situated businesses that locate new activity out of state, was discriminating in favor of in-state economic activity, in a manner "wholly inconsistent with the free trade purpose of the Commerce Clause." Pet. App. at 7a

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[6] *See, e.g., State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1082-83 (Ohio 1999) (recognizing citizen standing to address issues of "great importance and interest to the public"); *Clay v. Harrison Hills City Sch. Dist. Bd. of Educ.*, 723 N.E.2d 1149, 1153-54 (Ohio Com. Pl. 1999) (recognizing taxpayer standing based on state constitutional grant of access to the courts).

(quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977)). The court explained that

> any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere. Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

Pet. App. at 6a. By contrast, the court held the property tax exemption did not unconstitutionally discriminate against interstate commerce, because the specific terms imposed as conditions on the exemptions were "minor collateral requirements . . . directly linked to the use of the exempted . . . property." *Id.* at 12a.[7]

Both Petitioners sought rehearing of the Sixth Circuit's decision. In Ohio's petition, but not Daimler's, it argued for the first time that Respondents lacked standing. Ohio Pet. for Reh'g 2 (Sept. 16, 2004). When the Sixth

[7] The Sixth Circuit provided no explanation for characterizing the conditions imposed by the Ohio program as "minor" or "collateral," and it offered neither explanation nor authority for its view that conditions "directly linked to the use of the exempted . . . property" did not unconstitutionally discriminate against interstate commerce, despite the fact that this Court, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), had struck down precisely such a condition. Respondents' petition for review of the property tax exemption ruling remains pending. *Cuno v. DaimlerChrysler Corp.* (No. 04-1407).

Circuit declined to rehear the case, Petitioners sought review of the ITC ruling in this Court, but raised no questions about standing or the federal courts' jurisdiction over the case. Only after this Court directed the parties to brief standing have Petitioners taken up the argument that Respondents should be required to start over again in the state courts where they sought to conduct the litigation in the first place.

## SUMMARY OF ARGUMENT

1. Respondents are taxpayers of Ohio and Toledo, the two jurisdictions losing revenue from the ITC and property tax exemptions challenged in this case as violations of the Commerce Clause. They claim standing here in their capacities as state and municipal taxpayers, the standards for both of which, lower courts agree, are less difficult to satisfy than those for federal taxpayers. This Court has held that taxpayers can meet the requirements of Article III standing in some cases, including those in which the tax revenues are federal and in which the loss suffered was due to an expenditure (to support religious schools) that the Constitution prohibits, even where there was no showing that any taxpayer would have paid less taxes and/or received other benefits from the federal government if the challenged expenditures were set aside. *Flast v. Cohen*, 392 U.S. 83 (1968). The fact that *some* plaintiffs have standing to assert *some* federal claims based solely on their status as taxpayers demonstrates that Article III does not present an absolute barrier to upholding standing in this case. Rather, the question is whether prudential considerations should bar this Court from reaching the merits of the Sixth Circuit rulings.

There are three reasons why Petitioners' belated standing arguments should be rejected. First, Respondents should be found to have standing in their capacity as state

taxpayers to challenge a state law which unconstitutionally diminishes state tax revenues to the detriment of all the state's taxpayers. Even if the standards for state taxpayer standing are as stringent as those for federal taxpayers, standing is appropriate where the taxpayers' challenge has a sufficiently close nexus to their taxpayer status and rests on a constitutional provision, such as the Commerce Clause, which directly limits the states' taxing powers. *See Flast*, 392 U.S. at 102-03. Second, Respondents should be found to have standing in their capacity as municipal taxpayers, both because a substantial part of Ohio's franchise tax, whose revenues are depleted by the challenged ITC, is automatically transferred to local governments like Toledo, and because Respondents' municipal taxpayer standing to challenge the property tax exemptions in the Daimler agreement should extend to the entire case or controversy, of which the challenge to the ITC is an integral part. *See* 28 U.S.C. § 1367.

Finally, because the potential obstacles to the federal courts' jurisdiction in this case are prudential, and not constitutional, a wide range of factors peculiar to this case – the fact that defendants, not plaintiffs, invoked the jurisdiction of the federal courts; the efforts of plaintiffs to raise the issue of standing and have the case remanded to the state courts at the outset; the absence of any challenge to standing, by either defendants or the lower courts, in the years of litigation leading up to the Circuit Court's decision; the difficulty and novelty of the questions of state and municipal taxpayer standing; and the absence of an appellate court opinion on the application of those doctrines to these claims – suggest the desirability of upholding standing in the interests of "finality, efficiency, and economy," in the special circumstances of this case. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 (1996).

2. The Ohio ITC is a paradigm of a state tax provision which facially discriminates against interstate commerce by providing a direct advantage to in-state activity.

Because the ITC is only available for in-state investments in machinery and equipment, it allows those businesses which locate in the state to pay a lower tax to Ohio than their otherwise identically situated competitors with identical Ohio taxable income but who locate elsewhere. Such "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" has long been recognized to be "virtually *per se* invalid" under the Commerce Clause. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

Petitioners seek to avoid this conclusion by several flawed arguments. First, because Ohio's chosen apportionment formula (which determines the share of a multistate business's income that is subject to Ohio tax) attributes to Ohio more of the income of businesses locating new investment in-state than of similar businesses locating out-of-state, they contend that the ITC merely reduces the additional tax burden on in-state businesses and does not discriminate between similarly situated businesses. But this contention ignores the fact that, due to the ITC, the in-state company will pay a lower effective tax rate than its out-of-state competitor on the portion of income that Ohio has identified, under its presumptively fair apportionment rules, as subject to Ohio tax. So, it fails the very test previously applied by this Court in comparable circumstances. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984).

In addition, unable to identify a single case in which this Court has upheld a measure that provided preferential tax treatment conditioned on in-state economic activity, Petitioners offer several novel reinterpretations of the Court's Commerce Clause cases in an effort to distinguish Ohio's ITC from the numerous preferential provisions struck down by the Court. These restrictive reinterpretations depend on drawing a sharp distinction between tax measures which benefit in-state activity and those which

penalize out-of-state activity, a distinction the Court has repeatedly rejected, and one which can neither account for the Court's precedents nor further the Commerce Clause's central purposes. Nor are these restrictive reinterpretations necessary, as Petitioners contend, to preserve the states' autonomy to shape their tax systems or to devise other public policies that encourage local economic development. The states already have available a wide array of non-discriminatory tax and non-tax pro-development policies, such as lowering tax rates or improving infrastructure and schools, that face no danger from the Court's Commerce Clause jurisprudence.

## ARGUMENT

### I. Respondents have standing to maintain this Commerce Clause challenge.

#### A. Respondents have standing as state taxpayers to challenge tax measures that are claimed to violate the Commerce Clause.

This Court has had a number of opportunities in recent years to address the scope of federal taxpayers' standing, *see, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982). In those cases, it has identified a circumscribed set of conditions under which federal taxpayers have standing. *See, e.g., Bowen*, 487 U.S. at 618-20; *Flast v. Cohen*, 392 U.S. 83, 101-03 (1968). By contrast, the last case in which the Court issued a decision on state taxpayer standing was *Doremus v. Board of Education*, 342 U.S. 429 (1952), where the challenged governmental action – requiring daily Bible reading in the state's schools – was not alleged to have any impact on the state's revenues and thus could not ground any claim of taxpayer standing. *See also ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989)

(Kennedy, J., plurality opinion) (suggesting, in *dicta*, that state taxpayers are "likened . . . to federal taxpayers").

Absent more definitive guidance, the lower courts have adopted a range of approaches to questions of state taxpayer standing, with some applying the more liberal standards applicable to municipal taxpayers, *see, e.g., Arakaki v. Lingle*, 423 F.3d 954, 967-69 (9th Cir. 2005); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 508 (6th Cir. 2001) (equating municipal and state taxpayers as "nonfederal taxpayers" for standing purposes), while others use the stricter standards applicable to federal taxpayers, *see, e.g., Board of Educ. v. N.Y. St. Teachers Ret. Sys.*, 60 F.3d 106, 110 (2d Cir. 1995); *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402 (10th Cir. 1992). The leading treatise concludes, "When viewed from the perspectives of current standing doctrine, state taxpayer standing is more likely to seem plausible than federal taxpayer standing." 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.10 (2d ed. 1988); *see also* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 632 (2004) (describing state taxpayers as "subject to something like 'intermediate scrutiny' ").

In the present case, however, it is unnecessary to resolve the question of whether state taxpayers should be treated more hospitably than federal taxpayers. Even in the case of federal taxpayers, the Court has found standing where there is a sufficiently close nexus between the plaintiffs' taxpayer status and the claims that they assert. *See, e.g., Bowen, supra*; *Flast, supra*. Federal taxpayer claims must pass two tests. First, "the taxpayer must establish a logical link between that status and the type of legislative enactment attacked," *Flast*, 392 U.S. at 102, a link that is satisfied, in the federal taxpayer context, when the challenge is directed to an exercise of Congress's taxing and spending power. *See, e.g., Valley Forge*, 454 U.S. at 478. Second, "the taxpayer must establish a nexus

between that status and the precise nature of the constitutional infringement alleged," *Flast*, 392 U.S. at 102, a requirement that is met, in the federal context, when the suit rests on a constitutional provision that is a specific limitation on the exercise of the taxing and spending power, *id.* at 103.

State taxpayer claims like this one, asserting Commerce Clause challenges to state tax breaks, straightforwardly satisfy both *Flast* standards and hence should be allowed, even if the standards for state taxpayers are fully as restrictive as those for federal taxpayers. With regard to the first requirement, the legislative enactment challenged in the case, a credit against a state tax, is unquestionably an exercise of the state's taxing power, precisely analogous to exercises of the taxing power that satisfy *Flast*'s first prong. *See, e.g., Sch. Dist. v. Ball*, 473 U.S. 373, 380 n.5 (1985) (citing with approval the application of *Flast* standing for a taxpayer challenge to a state tax exemption in *Hunt v. McNair*, 413 U.S. 734 (1973)); *Johnson*, 241 F.3d at 507-08. *Cf. Hibbs v. Winn*, 542 U.S. 88, 110-12 (2004) (citing with approval the granting of jurisdiction in Establishment Clause challenges to state tax credits, deductions and exemptions). The grant of a state tax credit – as opposed, for instance, to a regulatory statute involving only "an incidental expenditure of tax funds," *Flast*, 392 U.S. at 102 – relates directly to a state taxpayer's interest qua taxpayer and causes a direct injury to that interest. The effect of the tax credit is to deplete the state coffers to which Respondents (individual and small business taxpayers) must contribute through their own tax obligations, with the result that either their contributions must be increased or the sum total available to fund programs on which they rely is diminished.

With regard to *Flast*'s second requirement, in cases involving federal taxpayer standing, only the Establishment Clause has been recognized as a "specific constitutional limitation[ ]," *id.* at 102-03, on the taxing and

spending power. Its special status rests on its special historical role. As the Court explained,

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general.

*Id.* at 103. In the case of the states' taxing powers, another constitutional provision – the Commerce Clause – has played a similar historical role, as a specific limit on discriminatory state taxation. Indeed, the central purpose of the Commerce Clause was to curb inappropriate state tax measures. "Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (citing *The Federalist* Nos. 7 & 11 (Alexander Hamilton)). And, just as James Madison explicated the crucial role of the Establishment Clause in preventing the improper use of governmental taxing and spending powers to aid religions, *see Flast*, 392 U.S. at 103-04, he likewise explained that the Commerce Clause "grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves." *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting letter from James Madison to J.C. Cabell (Feb. 13, 1829)).

In each case, the function of the constitutional provision is to prevent the government from providing special benefits to favored constituencies in ways that imperil the common good, *see, e.g., Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (noting "the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident

competitors"), and, in each case, the taxing and spending powers pose a significant threat of such favoritism.[8] In each case, the harm to be avoided by these fundamental protections is the loss of governmental neutrality, whether in the competition among religions or among in-state and out-of-state businesses, more than governmental intrusion on the rights or liberties of particular individuals or firms.[9] And in each case, the damage caused by violations of the provisions is, in large part, broadly diffused among all who contribute to government and depend on its benefits, but who are not benefitted by the forbidden special treatment. Indeed, in the Commerce Clause context, the Court has identified the "loss of specific tax revenues" as a type of injury against which the clause protects and as a permissible basis for standing, at least in the context of a suit brought by one state against another. *See Wyoming v. Oklahoma*, 502 U.S. 437, 447-448 (1992).

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[8] Both Establishment Clause and Commerce Clause can also be violated by regulatory measures, but taxpayer standing is not ordinarily available to challenge such measures. *See Flast*, 392 U.S. at 102 (distinguishing *Doremus*). The Commerce Clause is also, of course, an affirmative, but limited, grant of power to Congress. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995). But this aspect of the Commerce Clause is not a specific limit on Congress's taxing and spending power, and hence taxpayer standing would not extend to cases questioning exercises of Congress's Commerce Clause authority. *Cf. Flast*, 392 U.S. at 104-05.

[9] *Compare Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.") *with Quill*, 504 U.S. at 312 (observing that the Commerce Clause, as distinct from the Due Process Clause, is informed "not so much by concerns about fairness for the individual . . . as by structural concerns about the effects of state regulation on the national economy").

Thus, just as taxpayers (federal, state, and local) have standing to challenge taxing and spending that is alleged to violate the Establishment Clause's guarantee of neutrality in matters of religion, so state taxpayers should be found to have standing to challenge measures claimed to violate the Commerce Clause's core neutrality principle that no State "may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

### B. Respondents have standing as municipal taxpayers.

While there is uncertainty regarding the scope of state taxpayer standing, the courts have consistently viewed municipal taxpayers far more permissively than federal taxpayers. *See, e.g., Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 803 (2003) ("A presumption in favor of municipal taxpayer standing exists."). Federal courts have consistently acknowledged that municipal taxpayers have a more direct and immediate relationship to their communal fisc than state or federal taxpayers. Thus, "[w]hen a municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement is satisfied." *D.C. Common Cause v. Dist. of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988); *see, e.g., Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992).

This Court articulated the presumption of municipal taxpayer standing in *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923) ("the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate").

Since *Frothingham*, the Court has not revisited whether municipal taxpayers should be held to a different standard than state and federal taxpayers, but the lower courts have consistently preserved the distinction. *See City of New York*, 972 F.2d at 471 ("courts of appeals . . . have uniformly concluded that municipal taxpayers have standing to challenge allegedly unlawful municipal expenditures"). *Cf. ASARCO*, 490 U.S. at 613 (Kennedy, J., plurality opinion) (acknowledging, in *dicta*, the continuing validity of a distinction between municipal and federal taxpayers.) In the present case, Respondents have standing as municipal taxpayers because both the ITC and the property tax exemption directly reduce the revenues of the local governments to which Respondents pay taxes.

By operation of Ohio law, a portion of the state's franchise tax is automatically distributed to localities. Pursuant to O.R.C. § 5733.12, 4.2% of franchise tax revenue is allotted to the "Local Government Fund" and 0.6% to the "Local Government Revenue Assistance Fund." The sums in these two funds are then allocated to local governments pursuant to complex statutory formulae, *see* O.R.C. §§ 5747.50, 5747.61. Under these formulae, in 2003, approximately 4.3% of the amounts credited to the Funds was distributed to local entities to whom Respondents pay taxes.[10] Hence, of some $120 million in franchise tax revenues lost annually due to the ITC, about $250,000 (i.e., $120 million x 4.8% x 4.3%) represents revenues lost by local government units to which Respondents pay taxes, thereby injuring them materially in their municipal taxpayer role.

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[10] *See* Ohio Dep't of Taxation, Annual Report 2004 at 94-95 (available at http://tax.ohio.gov/divisions/communications/publications/annual_reports/publications_annual_report_2004.stm).

Of course, the loss of revenue at the local level due to the ITC is the result of a state law, and not primarily the work of the local government. The clearest case of municipal taxpayer standing is one in which the municipality itself has mishandled the funds of its resident taxpayers. However, courts have recognized that municipal taxpayer standing depends on the damage to the municipal fisc, and not on the particular government actor who has caused the loss. *See, e.g., Banner v. United States*, 428 F.3d 303, 307 n.5 (D.C. Cir. 2005); *Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 844 (6th Cir. 1984); *Cammack v. Waihee*, 932 F.2d 765, 770-71 (9th Cir. 1991).

Even if Respondents do not have municipal taxpayer standing based solely on their ITC claim, they had – and continue to have – standing as municipal taxpayers to challenge the property tax exemption in federal court. In the district court, Daimler conceded that plaintiffs had standing as municipal taxpayers to challenge the property tax exemption. *See* Daimler Mem. in Opp. to Pl. Mot. to Remand 14-17. This situation presents the paradigmatic example of municipal taxpayer standing, where the City has acted in a manner that depletes the municipal fisc. *See, e.g., Hawley*, 773 F.2d at 741; *City of New York*, 972 F.2d at 470-71. Here, Toledo has relieved Daimler from its obligation to pay personal property taxes, thereby reducing the city's tax revenue. As Toledo taxpayers, Respondents are directly injured by the City's action.

Even if Respondents' status as municipal taxpayers only applies to their challenge to the property tax exemptions, their standing with respect to that aspect of the case satisfies the minimum requirement that the district court had proper jurisdiction over at least some claims in the case when it was removed. And, once the requirement of a "civil action . . . of which the district courts of the United States have original jurisdiction" has been met, 28 U.S.C. § 1441(a), the district court properly exercised its jurisdiction over other claims that are parts of the same case or

controversy. *See Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165-66 (1997) (presence of one claim within federal court's jurisdiction warrants removal of entire case under 28 U.S.C. § 1441(c), including claims not otherwise removable).

This basic principle traces back to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), where the Court recognized "that, once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy." *Exxon Mobil Corp. v. Allapattah Services*, 125 S. Ct. 2611, 2617 (2005) (describing the holding of *Gibbs*). In particular, *Gibbs* found that, so long as there was a claim before the district court that satisfied the requirements of Article III, the court had the authority to also exercise jurisdiction over additional claims, if "the relationship between [the claims] permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *Gibbs*, 383 U.S. at 725. The requisite relationship is satisfied if the claims "derive from a common nucleus of operative fact," or if "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." If so, "there is power in federal courts to hear the whole." *Id.*

While *Gibbs* itself involved the extension of the federal courts' jurisdiction from a claim resting on federal law to a "pendent" claim grounded in state law, several courts have extended its reasoning to cases involving claims which, taken alone, would not have been cognizable due to the absence of standing, rather than the absence of a federal question. For example, in *Sierra Club v. Adams*, 578 F.2d 389, 391-93 (D.C. Cir. 1978), the court concluded that, because plaintiffs had standing to raise a challenge to one aspect of an environmental impact statement, they could also raise a separate claim about another aspect of that statement, despite failing to allege any harm to them

related to their second claim. *See also Iowa Indep. Bankers v. Bd. of Governors*, 511 F.2d 1288, 1293-94 (D.C. Cir. 1975).

Wright and Miller describe such cases as deploying a concept of "ancillary standing," under which "[o]nce a genuine case or controversy has been established for standing purposes, nothing in Article III should limit the theories that can be spun out of the 'common nucleus of operative fact.'" 13A WRIGHT & MILLER, *supra*, § 3531.16 at 109 (quoting *Gibbs*); *see also Jackson v. United States*, 881 F.2d 707, 711 (9th Cir. 1989) (invoking concept of "ancillary jurisdiction" to allow the government to litigate an issue for which it did not independently have standing). While Wright and Miller, *supra*, at 110-11, emphasize that the exercise of ancillary standing should be discretionary, taking account of, inter alia, "[e]fficiency and convenience . . . of the courts, parties, and others who are interested in the same issues," they note that taxpayer standing cases may be a particularly appropriate occasion for application of the concept. Indeed, they observe, *id.* at 111 n.14, that this Court appears to have acknowledged such a role for ancillary standing, in *Flast*, 392 U.S. at 104 n.25, in finding that plaintiffs' Establishment Clause standing extended to their Free Exercise claims.[11]

The authority of the district court to extend its jurisdiction from a single claim for which standing is established to other claims that are a part of the same case or

[11] Wright and Miller note that the final sentence of the *Flast* footnote raises doubts about the Court's acknowledgment of such ancillary standing for the Free Exercise claims; however, the most plausible reading of that sentence suggests that it is, instead, a comment on how the Court would analyze the question of Free Exercise Clause standing if considered in isolation from the independent Establishment Clause standing.

controversy also draws support from the text of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a):

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.

As the Court explained last Term, "Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction." *Exxon*, 125 S. Ct. at 2620. While the primary purpose behind Congress's adoption of § 1367 may have been to clarify the scope of the federal courts' pendent jurisdiction over state law claims, "[n]othing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories . . . historically labeled pendent and ancillary." *Id.* at 2621. Thus, where the district court has "original jurisdiction over a subset of the claims constituting the action," it has "original jurisdiction of a civil action for purposes of § 1441(a)," and therefore also has supplemental jurisdiction over the remainder of the action. *Id.* at 2623 (citing *Int'l Coll. of Surgeons*, 522 U.S. at 165).[12]

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[12] The State Petitioners cite *Lewis v. Casey*, 518 U.S. 343, 357-58 & n.6 (1996), to suggest that standing does not carry over from one claim to another. *See* St. Br. 22. But in *Lewis*, the claims that the plaintiff-prisoners sought to link to their own involved different prisoners facing disparate, and uncertain, obstacles under different circumstances, claims so distinct from plaintiffs' that there was little basis to regard them as part of a single case or controversy. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) (finding standing to challenge past

(Continued on following page)

In the present case, there is little room for question that the two challenged measures – the grants to Daimler of the two tax breaks that comprised the core of the incentives package assembled by State and City to induce Daimler to locate its plant in Toledo – were part of the same transaction or occurrence, and that Respondents' challenges to the two provisions constitute a single Article III case or controversy. *See Raygor v. Regents*, 534 U.S. 533, 540 (2002) (noting Federal Courts Study Committee's use of "same transaction or occurrence" standard in proposing what became § 1367). As the State observes, St. Br. 5-6, both tax incentives were part of a single agreement negotiated among the Petitioners. The counts of Respondents' suit are directed at different components of that single agreement, each of which was alleged to violate the Commerce Clause. If the individual claims of the 10,000 independent dealers in *Exxon* (and likewise the separate claims for non-physical injuries raised by the mother of a physically injured child in the case consolidated with *Exxon*, *see* 125 S. Ct. at 2616) form a single case or controversy, then so must the two claims here, which challenge two Ohio tax provisions applied in a single agreement regarding a single project. *See, e.g., Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995) (requiring at least a "loose factual connection between the claims," quoting 13B WRIGHT & MILLER, *supra*, § 3567.1, at 117).

In light of the intimate connection between the counts here, once the district court concluded that it had jurisdiction over some elements of Respondents' suit based on municipal taxpayer standing, *see* J.A. at 78a, it properly extended its jurisdiction to the entirety of the case. All of

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choke-hold incident, but declining to extend standing to completely separate, hypothetical, future incidents).

the "considerations of judicial economy, convenience and fairness to litigants," *Gibbs*, 383 U.S. at 726, favored keeping the entire case in a single forum, and none of the factors identified in § 1367(c) as justifying denial of supplemental jurisdiction were applicable. Indeed, had the court retained jurisdiction over the challenge to the property tax exemption while denying jurisdiction over the challenge to the ITC, the result would have been to compel plaintiffs, who had not sought a federal forum for the case, to litigate these closely connected issues in two separate venues. *See Exxon*, 125 S. Ct. at 2633 (Ginsburg, J., dissenting) (discussing the special importance of supplemental jurisdiction to allow inclusion of claims brought by parties haled into federal court against their will).

### C. Under the circumstances of this case, there are no standing barriers that preclude the Court from reaching the merits.

Moreover, the particular context and procedural history of this case provide compelling reasons why the Court should find standing here. Respondents brought this case nearly six years ago in the Ohio state courts, whose standing rules are less restrictive than the federal standards. *See* note 6 *supra*. Due to Petitioners' choice to remove the case, and despite Respondents' efforts to return it to state court, the case has now been extensively litigated in the federal courts, while Daimler has continued to reap the benefits of the challenged tax breaks. In the course of the litigation, Petitioners have repeatedly declined to challenge Respondents' standing, either before the district court, in defending the appeal to the Sixth Circuit, or in their petitions for certiorari here. Nor did either of the courts below raise doubts about their jurisdiction over the case. If this Court were now to deny federal jurisdiction and remand the case to the Ohio courts, all of

this effort and time, of both parties and courts, would be for nought, and Respondents would have been compelled to waste six years in a pointless detour beyond their control.

In light of this history, as in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 (1996), "considerations of finality, efficiency and economy become overwhelming" in disfavoring an outcome that would require the entire case, including the property tax issue on which Petitioners prevailed below, to be relitigated in the state courts. As in *Caterpillar*, the defendants here removed the case, plaintiffs timely objected, and, after the district court declined to remand, several years of litigation in the federal courts brought the case to a decision on the merits. In *Caterpillar*, the Court declined to require all of this work to be done over again in the state courts, even though the district court's assertion of jurisdiction had been in violation of statute, *id.* at 73. In that case, it was the party that had unsuccessfully sought remand and then lost on the merits who subsequently argued for starting over in state court, whereas here, it is the parties who invoked and defended federal jurisdiction who now seek to benefit from an opportunity to litigate the case anew in a different venue. Accordingly, the same "considerations of finality, efficiency and economy" that protected the judgment in *Caterpillar* should also govern here, perhaps even more so where the parties now seeking remand were responsible for bringing the case to federal court in the first place.

Of course, none of these prudential considerations can justify the Court in exercising jurisdiction over the case if it fails to satisfy Article III's requirements of a case or controversy. However, as we now demonstrate, the demands of Article III are met here, and the question of Respondents' standing is prudential, not constitutional, in nature.

First, as discussed in the preceding section, at least one of the challenged elements of the tax break agreement that is the subject of this suit – the property tax exemption – falls within the established parameters for municipal taxpayer standing, thereby ensuring that the case as a whole comes within Article III's ambit. Second, whether or not the Court agrees with Respondents' arguments that their challenge to Ohio's ITC satisfies the requirements for state or municipal taxpayer standing, the ITC, by significantly depleting the revenues in state and local funds to which Respondents contribute through their own taxes, has caused Respondents a real and palpable injury, of precisely the sort that this Court has recognized as satisfying Article III's injury, causation and redressability requirements. In both the Establishment Clause context, *see Flast*, 392 U.S. at 106, and in the municipal taxpayer context, *see Frothingham*, 262 U.S. at 486, the Court has found that the unlawful depletion of tax-supported governmental resources constitutes sufficient injury to affected taxpayers to create an Article III case or controversy.

Aside from instances where there was no showing of any appreciable impact on governmental resources, *see Doremus*, 342 U.S. at 434-35, the reasons the Court has given for withholding federal taxpayer standing have involved the generalized and widely shared nature of the harm, *see, e.g., Frothingham*, 262 U.S. at 487; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974), and the mismatch between the plaintiffs' interests qua taxpayers and the claims they seek to raise, *see, e.g., Valley Forge*, 454 U.S. at 480-81; *Schlesinger*, 418 U.S. at 228. But these considerations relate to factors repeatedly identified by the Court as prudential. *See, e.g., Valley Forge*, 454 U.S. at 474-75 (identifying bar on "generalized grievances, pervasively shared" and the requirement of a claim within the "zone of interests" asserted by plaintiffs as prudential requirements); *Warth v. Seldin*, 422 U.S. 490, 499-501 (1975) (similar, and noting that Art. III's requirements, unlike prudential requirements, can be met

even by "an injury shared by a large class of other possible litigants").

While arguments can be made that state taxpayers' claims of injury can be distinguished from those of municipal taxpayers because they are more "generalized" and widely shared, or that Commerce Clause challenges relate differently than Establishment Clause claims to a taxpayer's "zone of interests," such distinctions are matters of degree, not kind, and hence rest on prudential, not constitutional, grounds. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-24 (1998) (recognizing that generalized grievances can satisfy Article III so long as the harm suffered is concrete). Conversely, any argument that the taxpayers in the present case fail to assert a palpable injury, caused by the allegedly unconstitutional ITC and redressable by its invalidation, would raise identical doubts about Article III standing for taxpayers in familiar municipal and Establishment Clause contexts. *See Flast*, 392 U.S. at 101 (finding no Article III barrier to taxpayer standing); Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in* Daimler-Chrysler v. Cuno, 4 GEO. J.L. & PUB. POL'Y (forthcoming Feb. 2006) (manuscript at 10, *available at* http://ssrn.com/abstract=859784) (noting widespread characterization of *Frothingham* as "implicating only prudential concerns and not Article III standing requirements").

Third, as in *ASARCO*, 490 U.S. at 715-17, there is no doubt that the instant case presents a live case or controversy. In *ASARCO*, like here, the defendants were parties to an agreement with a state, which was challenged by state taxpayers in state court as violating federal law. In *ASARCO*, defendants did not invoke the jurisdiction of the federal courts until they sought review in this Court of an unfavorable final ruling in the state courts. The *ASARCO* Court found that the suit satisfied Article III's requirements, even if plaintiffs failed to qualify for taxpayer standing, where the "parties remain[ed] adverse, and

'valuable legal rights . . . [were] directly affected to a specific and substantial degree by the decision of the question of law,'" and where the suit addressed a specific, concrete agreement rather than seeking a mere advisory opinion. *Id.* at 619 (quoting *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 262 (1933)). Likewise, the state court suit here involved a dispute about the validity of a concrete agreement that conferred "valuable legal rights" on Daimler that were directly threatened by the litigation brought by taxpayers with interests adverse to it. Admittedly, in the present case, the defendants turned to the federal courts before, not after, their rights had been affected by an adverse state court ruling, but the existence of a case or controversy depends on the concreteness and timeliness of the dispute between the parties and the adverseness of their positions, not on the manner in which federal jurisdiction is invoked. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

Once it has been established that Article III's "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), has been satisfied, the decision whether to find standing rests on prudential considerations, which are "essentially matters of judicial self-governance." *Warth*, 422 U.S. at 500. While the courts have identified a number of significant prudential considerations, *see, e.g., Valley Forge*, 454 U.S. at 474-75, these are "merely . . . factor[s] to be balanced" in a prudential calculus, *id.* at 475, not rigid requirements. *See, e.g., Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 (1983) (declining to apply usual prudential factors in light of the prior history of the litigation); *Craig v. Boren*, 429 U.S. 190, 193-94 (1976) (same); *Fraternal Order of Police v. United States*, 173 F.3d 898, 905 (D.C. Cir. 1999).

In the present case, a wide range of considerations of "sound judicial policy," *ASARCO*, 490 U.S. at 613, favor a finding of standing. Of particular significance is the fact that it was defendants, not plaintiffs, who selected and

defended the use of a federal forum for a case filed in the Ohio state courts. Had plaintiffs chosen the federal forum, they could hardly complain about the hardship of seeing six years of effort wasted, or accuse defendants of seeking a "second bite of the apple" after losing on the merits. Conversely, where defendants have selected the forum, it is fundamentally unfair for them to now take up the argument that the suit does not belong in federal court.

Consistent with these concerns, the Court has repeatedly focused its analyses of standing on "the party attempting to invoke the federal judicial power." *Id.* at 618; *see also Valley Forge*, 454 U.S. at 477, 478 ("the party who invokes the power") (quoting *Doremus*, 342 U.S. at 434, and *Frothingham*, 262 U.S. at 488). As the district court correctly noted, "the burden of proving jurisdiction, and therefore standing," typically rests on the party removing the case to the federal courts. J.A. at 77a. *See Lujan*, 504 U.S. at 561. Indeed, where the question of standing hinges on prudential, rather than constitutional, considerations, it may be appropriate to treat the issue of prudential standing as waived by defendants who invoke the federal court's jurisdiction by removal, *cf. Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (finding that state's removal of case to federal court constituted a waiver of Eleventh Amendment immunity), or who fail to raise the issue in the proceedings below. *See Craig*, 429 U.S. at 193 (declining to apply prudential limits on standing where "the lower court already has entertained the relevant constitutional challenge and the parties have sought – or at least have never resisted – an authoritative constitutional determination"); *Board of Natural Res. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993) ("arguments raising prudential limitations can be deemed waived if not raised in the district court"). To remand the case to the state courts at this point "would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." *Craig*, 429 U.S. at 194.

An additional consequence of the absence of an earlier challenge to plaintiffs' standing by either Petitioners or the lower courts is that there has been no opportunity for the standing issues to benefit from the focusing effects of litigation. This Court ordinarily sits as a court of final review, addressing issues only after they have been sharpened and refined by extensive litigation and analysis below. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-09 (2001) (per curiam). In a case like this, where the proceedings below failed to develop complex issues of state and municipal taxpayer standing and supplemental jurisdiction, where the issues do not raise questions of the Court's constitutional jurisdiction, and where the losing party did not object to (and in fact invoked) the federal forum, it may well be the path of wise judicial administration and prudent use of the Court's limited resources to leave further resolution of these thorny issues for another day and uphold Respondents' standing based on the reasons set forth in this section C.

* * *

Should the Court nonetheless conclude that the federal courts lack jurisdiction over the case, the appropriate remedy is a remand of the case to the Ohio state courts. *See* 28 U.S.C. § 1447(c); *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991). Moreover, if there is a remand, Respondents will be entitled to move for attorneys' fees pursuant to § 1447(c). *See Martin v. Franklin Capital Corp.*, 126 S. Ct. 704 (2005).

## II. Ohio's Investment Tax Credit violates the Commerce Clause prohibition against state tax measures that discriminate against interstate commerce by providing a direct advantage to in-state economic activity.

A central purpose of the Commerce Clause, and indeed a central motivation behind the framing of the

Constitution, was to create and preserve "a national 'common market,'" *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977), in which economic actors could allocate their activities to the optimal locations without interference from preferential state regulation or taxation. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (describing "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that . . . the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) ("the very purpose of the Commerce Clause was to create an area of free trade among the several States") (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). In the oft quoted words of Justice Cardozo, "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Thus, "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in judgment)).

Among the primary threats to the functioning of this national common market, both in the Framers' time and today, have been the recurrent efforts of the states to use their tax systems to provide preferential treatment for in-state economic activity. *See, e.g., West Lynn*, 512 U.S. at 193 n.9 ("the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing'") (quoting James Madison); *Camps Newfound*,

520 U.S. at 622-23 (Thomas, J., dissenting) (citing examples of interstate tariffs in the post-Revolutionary period); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959) (noting that the Court, by 1959, had "handed down some three hundred full-dress opinions" addressing Commerce Clause challenges to state tax measures); *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (invalidating Alabama franchise tax that was calculated more favorably for domestic than out-of-state corporations).

In this long history, the Court's efforts to set appropriate Commerce Clause limits on state taxation have deployed a wide range of different, and at times inconsistent, approaches. Nevertheless, amidst this complexity,

> there emerge . . . some firm peaks of decision which remain unquestioned. Among these is the fundamental principle . . . : No State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business. The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects.

*Boston Stock*, 429 U.S. at 329 (internal quotations and citations omitted).

Over the years, the Court has invoked this rule against discriminatory preferences to strike down a wide array of state tax schemes designed to encourage in-state activity. *See, e.g., Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (invalidating New York corporate income tax credit measured by the share of a company's exporting business conducted from New York); *Fulton Corp. v. Faulkner*, 516

U.S. 325 (1996); *West Lynn*, *supra*. It is this fundamental "anti-discrimination principle," *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), that Ohio's ITC violates.

### A. Ohio's ITC facially discriminates in favor of in-state investment.

Ohio's corporate franchise tax, against which the ITC is applied, is a typical state tax on the apportioned net income of corporations that conduct business in the state. It applies to income earned through the interstate activity of corporations that engage in interstate commerce, so long as they have a taxable presence in Ohio. *See* O.R.C. § 5733.01(B). The tax is calculated by applying the statutory tax rate to the portion of the taxpayer's overall income, wherever earned, that Ohio deems should be attributed to the state based on its three-factor apportionment formula. St. Br. 7. While Ohio's apportionment formula uses the traditional three factors, i.e. the fractions of the taxpayer's property, payroll and sales located in Ohio, *see Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983), Ohio assigns the sales factor a weight three times greater than each of the other two factors. St. Br. 7. Due to the triple weighting of the sales factor, how much of a taxpayer's income is taxed in Ohio depends substantially less on where its production activities are located than on where its customers are.

Ohio's ITC, by contrast, applies only to investment in manufacturing machinery and equipment that are placed in service *within the state*. *See* O.R.C. § 5733.33(B)(1) (granting a credit only for investments "installed in this state"). By restricting the credit to in-state activities, while the underlying tax reaches interstate activity, the Ohio statute facially discriminates against interstate commerce.

Consider, for example, the situation of two corporations each subject to Ohio's franchise tax and each making sales of competing goods in Ohio. Assume that, under

Ohio's apportionment formula, each has taxable income in Ohio of $10 million, and therefore would ordinarily be subject to a tax of $850,000. *See* O.R.C. § 5733.06 (statutory rate of 8.5%).[13] Suppose further that one company has its manufacturing facility in Ohio, while the other's is out of state, and that each has recently undertaken a $100 million retooling of its plant. If the Ohio retooling meets the requirements of the Ohio ITC, then the company with the Ohio plant will be entitled to a tax credit of over $1 million in each of the next seven years (i.e. $100 million times 7.5% divided by 7), and therefore will pay no Ohio franchise tax, while its competitor must pay the standard $850,000 annual tax.[14]

As this Court has consistently recognized, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (internal quotations omitted). *See West Lynn*, 512 U.S. at 210-11 (Scalia, J., concurring) ("a tax . . . that is nondiscriminatory in its assessment, but that has an 'exemption' or 'credit' for in-state members . . . is no different in principle from [a directly discriminatory tax], and has likewise been held invalid"). This is precisely what Ohio's ITC does. Both the corporation manufacturing its products in Ohio and its out-of-state competitor have identical taxable income subject to Ohio tax. But, because the facially discriminatory ITC makes the actual tax burden on the out-of-state company far higher, the in-state company is placed at "a direct commercial advantage," *Boston*

[13] Because the first $50,000 of apportioned corporate income is subject to a lower tax rate, the actual amount would be slightly less.

[14] This Court found a similar simple example, offered by the United States, to be helpful to its analysis in *Maryland v. Louisiana*, 451 U.S. at 757 n.28.

*Stock*, 429 U.S. at 329, with respect to its out-of-state competitor. It is this blatantly discriminatory design of ITCs, like Ohio's, that has led commentators to discuss such provisions as paradigmatic examples of tax breaks that violate the Commerce Clause. *See, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 817-18 (1996); Robert D. Plattner, *State Business Tax Incentives: Are They Vulnerable to Constitutional Attack*, 2000 ST. TAX TODAY 128-19 (July 3, 2000).

Like many of the discriminatory tax provisions that have previously been found unconstitutional, Ohio's ITC has the purpose and effect, not only of treating in-state businesses more favorably than their interstate competitors, but also of encouraging corporations to locate new economic activity inside Ohio, rather than elsewhere. *See, e.g., Fulton*, 516 U.S. at 333 & n.3; *Maryland v. Louisiana*, 451 U.S. at 756-57; *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 72 (1963). As the Court of Appeals explained, in describing how the provision discriminates against interstate activity:

> as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

Pet. App. at 6a.

Petitioners argue that because the credit's benefits are available to any corporation that chooses to locate new economic activity in Ohio, it does not discriminate against out-of-state businesses. St. Br. 41-42; Br. for Pet'r DaimlerChrysler ("DC Br.") 45. But, as in *Bacchus Imps. Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse*, *supra*; and *Boston Stock*, *supra*, the fact that Ohio's ITC does not

discriminate on the basis of a company's domicile or the location of its *pre*-investment activity does nothing to ameliorate the ITC's facial discrimination on the basis of where the company sites its new investments (and where it is located *post*-investment, i.e., at the time that it enjoys the preferential treatment).

Petitioners also argue that the ITC's differential treatment of similarly situated companies does not constitute discrimination, because, as a result of their different choices about where to locate, the two businesses are no longer "similarly situated." St. Br. 47-48; DC Br. 40-42. In support, they note that one effect of locating a plant out-of-state will be to reduce the proportion of the business's income that is apportioned to Ohio and subject to tax there, while an in-state siting will have the opposite effect. Thus, Petitioners suggest, a business choosing an out-of-state location will see its Ohio tax reduced, while one locating in-state will see its tax increased. They argue that, under these circumstances, the ITC only serves to counterbalance the extra tax burden imposed on the business choosing the in-state location.

In *Westinghouse*, however, the Court directly rejected precisely this argument. *See* 466 U.S. at 400-02 n.9. There, the Court began with a simple example of the discriminatory effects of the challenged credits, in which three hypothetical businesses with identical apportionment ratios had different levels of export activity located in New York and therefore earned different sizes of credits, with the result that the business with the greatest export activity in New York paid the least tax. But the Court went on to observe that this example overlooks the fact that the shifting of more export activity into New York would also result in an increase in the share of the business's income apportioned to New York and, hence, an increase in its New York tax, an increase that is only partially offset by the increased export credit.

However, rather than taking this difference as a justification for the alleged discrimination, as Petitioners here urge, the Court turned instead to a more refined analysis, which examined the effect of the credit on the effective tax rates paid by the different businesses on their income apportioned to New York. While the absolute tax liability was greatest for the business with the most export activity in New York, that business also, due to the credit, paid the lowest effective tax rate, thus evidencing, in the Court's analysis, the credit's discriminatory treatment which violated the Commerce Clause.

Applying the *Westinghouse* approach to this case, a business which locates its new plant outside of Ohio will face an effective tax rate of 8.5% on its income apportioned to Ohio, since it earns no ITC. By contrast, its competitor which chooses an Ohio location for its new facility will, for the next seven to ten years, pay an effective tax rate of less than 8.5% due to the reduction of its tax by the ITC. Just like in *Westinghouse*, the location based credit scheme here discriminates in favor of in-state activity by affording a lower effective tax burden to businesses locating their activities in the state. In fact, the discrimination caused by the Ohio ITC will typically be more dramatic and blatant than the discrimination noted in the *Westinghouse* examples, because, due largely to Ohio's triple weighting of the sales component of its apportionment formula (a factor largely unaffected by the location of production facilities), the reductions in a business's Ohio tax liability due to location of a new plant outside the state will typically be dwarfed by the tax reductions achieved by its in-state competitor who qualifies for the ITC.[15]

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[15] To see why the tax reduction from locating new facilities out of state will typically be far smaller than the benefits of the ITC for a competitor locating in Ohio, consider the detailed, realistic example set forth in the App. to Br. of Amicus Curiae Center on Budget and Policy Priorities. There, the company locating its new facility in "Other State"

(Continued on following page)

In any case, Ohio's rules for the apportionment of income reflect its judgments about how to fairly determine the share of a business's income that is earned in, and should be subject to tax in, Ohio. To the extent that location of a new facility outside the state reduces a business's Ohio franchise tax, that reduction simply reflects Ohio's recognition that the location of productive capacity is a relevant factor in determining where income is earned.

With its discriminatory ITC, Ohio has overridden its fair apportionment system by taxing those businesses which locate their manufacturing capacity out of state at the statutory tax rate, while imposing substantially lower effective tax rates on those businesses whose productive capacity is located within Ohio's borders. The result is a direct competitive advantage for the in-state businesses, which, just like a tariff, offers economic benefits not only to the in-state businesses but to their local suppliers and employees, and, also just like a tariff, benefits the local economy by encouraging additional businesses to locate their activities in-state to avoid the burdens of differentially heavier taxation. *See, e.g., West Lynn*, 512 U.S. at 193 (describing the harmful effects of tariffs).

The prospect of achieving these local benefits makes ITCs and similar location-based tax breaks extremely attractive to state policymakers, and it is perhaps unsurprising that the vast majority of states have adopted ITCs and similar measures. *See* St. Pet. 22 n.5. But, to the extent that one state is helped by such measures, it is at the expense of other states, and at the expense of interstate friction and disruption of the efficient allocation of resources in an open national common market. *See, e.g.,*

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thereby reduced its Ohio tax liability by only $17,000, while the otherwise identical company locating its facility in Ohio earned an ITC of more than $96,000 for each of the next seven years, more than enough to eliminate its entire Ohio tax liability. Similar outcomes will result from a very wide range of plausible scenarios.

KENNETH THOMAS, COMPETING FOR CAPITAL 1-49 (2000); Br. of Amici Curiae Econ. & Pub. Policy Professors Randy Albelda, et al. These are precisely the ills of "economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. at 325, against which the Commerce Clause was directed, with its central premise that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union not division." *Baldwin*, 294 U.S. at 523.

Petitioners argue that the effect of Ohio's ITC is actually to encourage and reward interstate investment in Ohio by out-of-state businesses, and that the credit thereby supports Commerce Clause goals of furthering interstate commerce. St. Br. 49; DC Br. 44. But,

> [a] State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce. . . . [The Commerce Clause's] free trade purpose is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all state boundaries.

*Boston Stock*, 429 U.S. at 334-335.

Similarly, Petitioners and their amici attempt to defend states' use of ITCs and similar devices on the ground that they are important tools in enhancing the United States' position in the global competition for business investment and jobs. *See, e.g.*, St. Br. 4, 50; Br. of Amici Curiae Nat'l Governors Ass'n et al. 1. However, leaving aside the lack of any evidence that state tax breaks have the capacity – or were intended – to influence international investment choices, the prospect of the fifty states using their tax regimes to shape the nation's international trade policy runs directly counter to the Constitution's delegation of authority over foreign trade to Congress. *See, e.g., Kraft Gen. Foods v. Iowa Dep't of Rev.*

*& Fin.*, 505 U.S. 71, 82 (1992) (invalidating state tax measure that discriminated against foreign commerce). Such Foreign Commerce Clause concerns are particularly strong when a state's actions prevent the nation from "speaking with one voice" in regulating international trade relations, *see, e.g., Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 451 (1979), by raising conflicts with national policies embodied in treaty commitments. This is precisely what tax breaks like Ohio's ITC threaten to do. *See, e.g.*, Request for the Establishment of a Panel by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/2 (June 3, 2005) (World Trade Organization challenge to location-based tax breaks offered by states to Boeing); *see also* Arthur Rogers, *EC Will Investigate Kansas Tax Breaks Aimed at Luring British Production Plant*, BNA DAILY TAX REPORT, April 15, 2005 (describing potential for a similar challenge).

> While the Federal Government may seek to increase domestic employment and improve our balance-of-payments by offering tax advantages to those who produce in the United States rather than abroad, a State may not encourage the development of local industry by means of taxing measures that invite a multiplication of preferential trade areas within the United States, in contravention of the Commerce Clause.

*Westinghouse*, 466 U.S. at 405 (internal quotations and citations omitted).

### B. Petitioners' attempts to narrow the anti-discrimination principle are incompatible with precedent and the Commerce Clause's central purposes.

Petitioners face a daunting challenge. They cannot dispute that the purpose and effect of Ohio's ITC is to grant to businesses that locate new investment in Ohio distinctively favorable treatment not available to competitors who

locate comparable new investment elsewhere. And yet, they are unable to point to a single case in which the Court has upheld a measure that provided preferential tax treatment conditioned upon in-state economic activity.

Petitioners seek to avoid the conclusion that this "direct commercial advantage," *Boston Stock*, 429 U.S. at 329, for in-state business activity violates the Commerce Clause's anti-discrimination principle by proposing several novel and narrow interpretations of the Court's anti-discrimination case law, which, they contend, allow for a distinction between the measures previously invalidated by the Court and Ohio's ITC. These interpretations seek to restrict application of the anti-discrimination principle to measures that impose penalties on out-of-state activity, rather than benefitting in-state activity.

In fact, however, Petitioners' novel interpretations not only fail to accommodate the cases or the Court's explanations, but they would also have the effect of largely eviscerating the Commerce Clause's bar against discriminatory tax measures, by re-introducing formalistic distinctions easily manipulated by state policymakers wishing to revive forbidden discriminatory schemes. And their reinterpretations of the anti-discrimination principle are not needed – as Petitioners suggest they are – to preserve the states' broad autonomy over their tax policies and other measures to support their local economies. To avoid severe damage to a long-standing, straightforward and effective element of its Commerce Clause jurisprudence, the Court should reject these unwarranted proposals for ad hoc change.

### i. Petitioners' proposed narrowing of the anti-discrimination principle to distinguish between tax benefits and tax penalties should be rejected.

Petitioners' primary argument is that the Commerce Clause only invalidates state tax measures as discriminatory

if they either function as tariffs levied directly on interstate transactions or impose tax penalties on businesses for their out-of-state activities. They contend that Ohio's ITC, since it applies against an income tax, rather than a transactional tax, and since it provides tax reductions ("benefits") for in-state activity, rather than tax increases ("penalties") for out-of-state activity, does not run afoul of either prong of this restrictive framing of an anti-discrimination principle. *See* St. Br. 35-41; DC Br. 26-30.

This bifurcated categorization of the case law had its origins in a law review article written to contain the implications of the Court's rapidly expanding body of anti-discrimination tax cases, and particularly *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Philip Tatarowicz & Rebecca Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986). But this attempted compartmentalization of the Court's anti-discrimination jurisprudence can account neither for the Court's explanations of its reasoning nor for a number of its decisions. *See* Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 813-15.

Petitioners' proposed framework depends on a crucial distinction between provisions that increase taxpayers' burdens due to out-of-state activity and those that "merely" diminish burdens on account of in-state activity. But they are unable to cite a single case in which the Court has deployed such a distinction. On the contrary, the Court has expressly, and quite sensibly, disavowed any distinction, for anti-discrimination purposes, between tax benefits and burdens:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

*Bacchus*, 468 U.S. at 273. *See Westinghouse*, 466 U.S. at 404 ("Nor is it relevant that New York discriminates . . . by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical.").

Petitioners seek to deploy their analytic schema to limit the impact of the Court's holding in *Westinghouse*, *supra*, which found unconstitutional New York's corporate income tax credits that were measured by the extent of the taxpayer's in-state export activities. The *Westinghouse* Court did observe that the scheme invalidated there, not only increased the credits as activity in New York increased, but also decreased the credits as activity elsewhere expanded, a feature that the Court described as the credit's "most pernicious feature." *Id.*, 466 U.S. at 401 n.9. But a thorough reading of the Court's opinion makes clear that this feature of the New York provision was not, as Petitioners insist, essential to the Court's ruling. In fact, the Court focused primarily on the benefits provided for New York activity, describing the provision as "an attempt to 'provide a positive incentive for increased business activity in New York.'" *Id.* at 393. And when the Court offered three detailed examples of the workings of the credit, each intended to show the discriminatory effects of the provision, only the last one exemplified the "penalty" effect, while the others focused on the benefits that result from increasing in-state activity. *Id.* at 401 n.9. As prominent scholars have observed, "The clear thrust of the opinion was that any provision that reduces the taxpayer's 'effective [in-state] tax rate' as the taxpayer engages in more in-state activity violates the Commerce Clause." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 815 (citations omitted).

Nor can their categorization accommodate a number of the Court's other anti-discrimination decisions. For

example, in *Maryland v. Louisiana*, *supra*, the Court struck down several aspects of Louisiana's tax on the transportation in Louisiana of off-shore natural gas, including a credit allowing taxpayers to use the tax on off-shore gas to reduce severance taxes on (unrelated) in-state mineral extraction.[16] As the Court explained, the discriminatory feature of this provision was not any penalty imposed on out-of-state operations, but rather the benefit it provided for in-state activity and the resultant incentive "to invest in mineral exploration and development within Louisiana rather than to invest . . . in other States." *Id.* at 757. Other examples that cannot be accommodated within Petitioners' framework include *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987) (striking down Pennsylvania's flat-rate axle tax because it favors businesses using their trucks exclusively in-state) and *Camps Newfound*, *supra* (invalidating a Maine property tax exemption restricted to charitable organizations providing services primarily to in-state residents). The simple fact is that the Court's consistent approach has been to invalidate measures that are structured to favor in-state over out-of-state activity, without regard to whether the discrimination is achieved by providing a benefit for in-state activity or imposing a burden on out-of-state alternatives.

Were the Court to change course and adopt the narrowed anti-discrimination analysis suggested by Petitioners, it would do serious harm to the efficacy and clarity of this element of Commerce Clause jurisprudence. The

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[16] Petitioners suggest that *Maryland v. Louisiana* is a case that fits within their narrow categories, *see* St. Br. 39; DC Br. 28, but they do so by limiting their discussion to a second element of the Louisiana tax scheme, its exemptions for gas used for specified in-state activities, which the Court also struck down. They simply omit any discussion of the Court's invalidation of the credit provision, which cannot be forced into their artificial framework.

Court's present test, whether there is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Oregon Waste*, 511 U.S. at 99, focuses effectively and straightforwardly on the "practical effect," *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), of the challenged measure. By contrast, the proposed distinction between benefits for in-state activity and penalties on out-of-state activity would reintroduce precisely the focus on formal phrasing and technical structure that bedeviled the Court's pre-*Complete Auto* case law. *See West Lynn*, 512 U.S. at 201 ("our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects"). If the Court were to adopt Petitioners' distinction, the states could, with ingenuity, revive many of the discriminatory schemes struck down by the Court in new guises that used "benefits" instead of "burdens" to achieve identical practical effects.[17] It is precisely to avoid such a triumph of form over substance that the Court has emphasized the futility of a distinction between benefits to one class of taxpayers and burdens on another in assessing the discriminatory character of taxes affecting interstate activity. *See, e.g., Bacchus*, 468 U.S. at 273; *cf. West Lynn*, 512 U.S. at 211 (Scalia, J., concurring) (arguing that a credit against a neutral tax is "no different in principle" from a directly discriminatory tax and must be treated comparably).

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[17] For example, forbidden exemptions from excise taxes, like those in *Bacchus, supra*, or *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), could be recast as identically measured credits against a corporate income tax. And the credit scheme struck down in *Westinghouse* could be recast to avoid its "penalty" feature by calculating it on the basis of the dollar volume of in-state export activity, rather than using the problematic ratio of in-state to total export activity.

**ii. The suggestion that the Commerce Clause is inapplicable here because there is no regulation of interstate commerce flies in the face of both precedent and logic.**

For the first time in its brief here, Daimler introduces a new and far more radical variant of the proposal to draw a sharp distinction between tax benefits and burdens. DC Br. 32-40. It asserts that the challenged Ohio tax scheme does not impose any burden on interstate commerce and hence does not come within the scope of Commerce Clause constraints at all, because a state tax "triggers dormant Commerce Clause scrutiny only when it imposes a burden on interstate commerce." *Id.* at 34. Thus, Daimler suggests, the measure challenged here, since it merely provides a benefit for in-state activity, does not "regulate" interstate commerce at all, and hence cannot "transgress the dormant Commerce Clause's limitations." *Id.* at 33.

This argument rests on the premise that it is "a prerequisite for discrimination analysis under the dormant Commerce Clause" that "the underlying state tax burdens interstate commerce." *Id.* at 34. To the extent that Petitioner contends that "the underlying state tax" here, Ohio's corporate franchise tax, does not burden interstate commerce, the simple answer is that, as a tax on an apportioned share of the total income earned by corporations through the operation of an interstate business, the franchise tax is unquestionably a tax upon, and thereby a burden upon, interstate commerce. This Court's voluminous case law discussing Commerce Clause limitations on state taxes on apportioned corporate income give ample witness to that fact. *See, e.g., Container Corp., supra*; *Northwestern States, supra*.

At times, Petitioner appears to be making a somewhat narrower argument – that the Court has only found tax

breaks unconstitutional "where the underlying state tax reached – and as a result burdened – interstate transactions against which the state's tax exemption or credit supposedly discriminated." DC Br. 37. The argument is apparently that, since Ohio's franchise tax "does not apply to out-of-state capital investments," *id.* at 36, Ohio's ITC cannot violate the Commerce Clause by "supposedly" discriminating against such investments.

Of course, the reason that Ohio's franchise tax "does not apply" to out-of-state investment is because it is not a tax on investments at all, but rather a tax on the income that may be earned from such investments.[18] And Daimler is able to point to absolutely nothing in case law or in scholarly commentary to support its suggestion that the Commerce Clause only applies when such a narrow condition is met. Indeed, many of the tax breaks struck down by this Court as discriminatory involved taxes that "did not apply" to the kinds of transactions that qualified for (or were discriminated against by) the challenged tax breaks. For example, in *Camps Newfound*, *supra*, the Court struck down an exemption from Maine's property taxes that was conditioned on the exempted property being used to provide charitable services primarily to in-state residents, but the property tax certainly did not "apply to" or "reach" the provision of services to out-of-state residents, because it was a tax on property not on services. *See also, e.g., Maryland v. Louisiana*, *supra* (invalidating a credit against in-state severance tax based on interstate tax on transportation of off-shore gas); *Fulton*, *supra* (invalidating a reduction in a property tax

[18] While new out-of-state investment may, as Daimler notes, DC Br. 35-36, reduce the share of the company's total income that is apportioned to Ohio, a substantial proportion of the income earned through that new investment is still likely to be apportioned to Ohio, especially in light of the triple weighting that Ohio assigns to the sales factor.

on owners of shares of stock based on how much of the issuer's business was conducted in-state).

As these examples underscore, and contrary to Daimler's assertion, DC Br. 39, this Court has repeatedly and appropriately invalidated state tax breaks notwithstanding the fact that "the tax did not . . . levy against interstate transactions alleged to be prejudiced." And here, again, were the Court to adopt Petitioner's proposed narrowing of the Commerce Clause's reach, it would essentially be inviting the states to structure an endless array of blatantly discriminatory tax breaks as credits against state taxes that were not themselves levied on the kind of activity being discriminatorily rewarded. *See Westinghouse*, 466 U.S. at 404 (rejecting the possibility of a state using credits against a franchise tax on income to accomplish what would be forbidden for a parallel location-based reduction in a transactional tax). The result would be precisely the triumph of form over function that the Court emphatically rejected in *Complete Auto*, 430 U.S. at 288 (renouncing reliance on "formalism [that] merely obscures the question whether the tax produces a forbidden effect"); *see West Lynn*, 512 U.S. at 201.

### iii. The anti-discrimination principle leaves intact a wide range of state measures to promote economic growth and does not invite judicial intrusion into state tax policy-making.

Petitioners suggest that an anti-discrimination principle broad enough to invalidate Ohio's ITC will inevitably carry the Court's dormant Commerce Clause jurisprudence far beyond its familiar boundaries, and that their narrowed reinterpretations are necessary to keep the Clause within reasonable bounds. In particular, they contend both that an unrestricted anti-discrimination

principle would invalidate virtually any state efforts to promote development of their local economies, DC Br. 37; St. Br. 45-46, and that it would require the Court to impose a totally uniform system of taxation on the states, St. Br. 45-47; DC Br. 47-48.

These fears, however, are entirely groundless. There are a great many ways that the states are free to shape their tax systems to create a favorable environment for economic activity, which do not involve any kind of preferential treatment for in-state activity. They can reduce the rates at which they tax business income; they can exempt business property (or specified types of business property) from property taxation, or tax it at lower rates than other kinds of property; they can exempt business inputs from sales taxation. In each case, such measures reduce the tax burdens on in-state businesses, but do so without favoring in-state businesses over out-of-state competitors (which in some cases, e.g. property taxation, are not subject to tax at all, and in others, e.g. lowered income tax rates, are treated identically to their in-state rivals).

If the Court is to fulfill the Commerce Clause's function of protecting the national economy and the states themselves from the "Balkanization" that results from protectionist preferential tax treatment of in-state economic activity while preserving the states' broad autonomy over matters of tax and economic policy, it is essential to draw as bright a line as possible on the continuum between tariffs and simple variations in tax rates and tax bases. *See West Lynn*, 512 U.S. at 211-12 (Scalia, J., concurring) (seeking to draw "a clear, rational line"). In the long evolution of the Court's dormant Commerce Clause jurisprudence, the anti-discrimination principle has remained a "firm peak[] of decision," *Boston Stock*, 429 U.S. at 329, because it provides a clear boundary which leaves wide latitude to the states in matters of taxation,

while barring "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*, 511 U.S. at 99.

Beyond taxation, the Commerce Clause also leaves wide latitude for state programs in support of economic development, ranging from worker training and infrastructure construction to low interest loans and preferential purchases of in-state goods or services. As the Court has repeatedly recognized, such state programs, involving the deployment of state resources, are not, ordinarily, "the kind of action with which the Commerce Clause is concerned," *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805 (1976), because "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). Where a state uses its own resources to "enter[] into the market itself," its conduct does not trigger Commerce Clause scrutiny, even if it participates in the market in a manner that favors in-state activities or actors. *Alexandria Scrap*, 426 U.S. at 806; *cf. New Energy*, 486 U.S. at 277 (distinguishing tax measures from direct spending programs because taxation is "a primeval governmental activity").

Of course, as Petitioners observe, DC Br. 33, the states may well be able, through such direct uses of state resources, to provide incentives for businesses that, from the businesses' perspective, are quite similar to an ITC or other tax incentives barred by the Commerce Clause. But here, again, the Court's boundary makes good sense. Not only does it draw a bright line which is solidly grounded in the Commerce Clause's focus on the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, but it also reflects the important practical differences, from the perspective of state policymakers, between the relative ease with which tax breaks can be

enacted and the difficulty and complexity of enacting expenditure programs, and hence the need for stricter external constraints on the former. *See, e.g.*, Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 480-81 (1989).

Thus, the prohibition on tax measures that discriminate against interstate commerce leaves ample opportunity for the states to foster local economic development, both through tax policies and through other governmental programs. As the Court has stated over and over again in cases striking down discriminatory state tax provisions, nothing in those decisions "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," *Boston Stock*, 429 U.S. at 336, or from "enact[ing] laws pursuant to [their] police powers that have the purpose and effect of encouraging domestic industry," *Bacchus*, 468 U.S. at 271. The restriction imposed by the Commerce Clause is directed not at ends, but at means. The Court has consistently been careful to distinguish the legitimacy of the state's purposes from the acceptability of the means selected to further them, *see id.*, and to clarify that the permissible means do not include measures that discriminate between in-state and out-of-state activity, *see, e.g.*, *Boston Stock*, 429 U.S. at 337. The specific sorts of state competition for industry that the Court's dicta have countenanced, such as uniformly applicable reductions of state taxes and government support for services needed by business, *see, e.g.*, *West Lynn*, 512 U.S. at 199 n.15, include only provisions that do not differentiate benefits or burdens based on a business's location.

Ohio's ITC, by contrast, expressly provides a direct commercial advantage to businesses making their new investments within the state, by subjecting them to a

lower tax burden than their competitors who locate new investments elsewhere. This is precisely the kind of discrimination that this Court has consistently invalidated, in furtherance of "the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

## CONCLUSION

For these reasons, the Court should find that the federal courts have jurisdiction over this case and should affirm the Sixth Circuit's decision finding Ohio's investment tax credit in violation of the Commerce Clause. Should the Court conclude that the federal courts lack jurisdiction, the appropriate remedy is a remand to the Ohio state courts, from which it was removed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

*Petitioner,*

v.

CHARLOTTE CUNO, ET AL.,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Sixth Circuit**

## REPLY BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

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## REPLY BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

The first two paragraphs of respondents' brief reveal fundamental deficiencies in the merits of their case as well as their capacity to maintain it. They affirmatively proclaim that precisely because "most jurisdictions offer comparable tax breaks," the tax credits they challenge "only have *minimal impacts on business decisions*." Resp. Br. 1 (emphasis added). That is a devastating concession because it means that, far from coercing Ohio companies to invest in-state rather than elsewhere, Ohio's investment tax credit (ITC) has, at the very most, a "minimal" potential impact on Ohio's economy or interstate commerce generally.

Respondents thus acknowledge their objection is not that the ITC raises barriers to their ability to compete fairly in interstate commerce—from time immemorial, the central concern of the dormant Commerce Clause. Rather, respondents' real complaint is the supposed "high costs on states and localities in lost tax revenues" from "tax breaks" targeted to certain businesses and the resulting "shift of the costs of state and local government to other classes of taxpayers, like Respondents." Resp. Br. 1, 4. But this generalized grievance—entirely divorced from the purposes of the Commerce Clause, available in equal measure to all taxpayers of Ohio, and predicated only on claims of injury that are, at the very most, uncertain, remote, attenuated, and speculative—cannot possibly satisfy the "irreducible minimum requirements" for Article III standing.

Even if respondents could establish jurisdiction, their concession that the ITC has no significant impact on interstate commerce is just as surely fatal to the merits of their claim. Respondents would have this Court extend the preemptive force of the dormant Commerce Clause to invalidate not just state laws that obstruct interstate commerce, but all state policies of "taxation and regulation that advantage[] in-state economic activity." Resp. Br. 1. This Court, however,

has never construed the dormant Commerce Clause to intrude so deeply into state fiscal policies and essential police powers. Respondents' vision of "national control[]" over the economy (*id.*) conflicts irreconcilably with the Constitution's fundamental structural commitment to federalism.

Ohio's ITC is available to in-state and out-of-state competitors on equal terms. Its manifest purpose is to attract investment, whether from within the State or from without. It imposes no burdens on or impediments to interstate commerce. It assesses no taxes on out-of-state actors or actions. And it does nothing to impair or inhibit the free flow of trade. Indeed, as 18 amicus briefs on behalf of nearly 80 public and private entities attest, credits such as the one offered by Ohio not only encourage interstate commerce, they are vital tools in both domestic and foreign competition for business and job development. This tax incentive does not violate the dormant Commerce Clause.

## ARGUMENT

### I. RESPONDENTS' NOVEL ARGUMENTS FOR TAXPAYER STANDING MUST BE REJECTED

#### A. Respondents Cannot Satisfy The Minimum Article III Requirements for Federal Jurisdiction

This is not a close case for standing. Respondents fail the first and most basic of the "irreducible constitutional minimum" requirements for Article III standing: a "concrete and particularized" "injury in fact" that is "actual or imminent," not "conjectural or hypothetical." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Respondents nowhere allege that they participate meaningfully in interstate commerce or are competitors with others that do. *See* J.A. 18a-19a. Rather, their sole allegation of jurisprudential injury is entirely unrelated to interstate commerce; respondents claim only that the ITC "deplete[s] the state coffers to which Respondents . . . must contribute" such that "either their contributions must be increased or the sum total avail-

able to fund programs on which they rely is diminished." Resp. Br. 12; *see also* J.A. 28a (Compl. ¶ 40).[1]

But this is no more than a claim that respondents have been exposed to "the burden of taxation in support of an [allegedly] unconstitutional regime." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 477 (1982). This Court has long rejected taxpayer standing based on allegations that the challenged expenditure is "likely to produce additional taxation to be imposed upon a vast number of taxpayers." *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923). As this Court stated more recently, "a generally available grievance about government . . . seeking relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large -- does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also FEC v. Akins*, 524 U.S. 11, 23-24 (1998); *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 64 (1997).

A state taxpayer can satisfy Article III's injury-in-fact requirement only when the plaintiff alleges a "direct and particular financial interest" in the outcome of the litigation. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952). Respondents allege "not a direct dollars-and-cents injury," *id.* at 434, but a political difference. Far from demonstrating that the ITC increases their tax burden in some tangible way, respondents' brief makes clear that their alleged injuries are, at most, a matter of steep conjecture.

*First*, respondents freely admit that tax incentives like Ohio's are practiced virtually everywhere and have only "minimal impacts on business decisions." Resp. Br. 1. Thus, *a fortiori*, the ITC can have no more than "minimal" impact on respondents' taxes. *Second*, there is little reason to believe that, over the long run, the ITC reduces the revenues collected by the State. To the contrary, if the ITC functions

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[1] Respondents have abandoned any special claim to standing for Kim's Auto (through the eminent domain seizure of its property) or any standing claim at all for the Michigan respondents.

as the Ohio legislature intended, it encourages greater productive investments and economic activity in State, and thus greater taxable revenues—just the opposite of respondents' claims. Moreover, most capital investments will continue to generate tax revenue long after the seven-year ITC expires. *Third*, even if Ohio's revenues were depleted in exactly the manner that respondents allege, respondents point to no change in the taxes *they* now pay or the services *they* now enjoy, and they offer no reason beyond their *ipse dixit* that those taxes or services will be affected in the future. In the absence of any allegation of a "concrete and particularized" "dollars-and-cents injury," this Court's precedents require dismissal of the respondents' dormant Commerce Clause challenge for lack of standing.[2]

### B. *Flast v. Cohen* Does Not Endow Taxpayers With Standing to Bring Commerce Clause Challenges To State Taxes

Respondents pointedly have dodged this Court's *Doremus* standard for state taxpayer standing in favor of a singularly broad interpretation of the test for federal taxpayer standing set out in *Flast v. Cohen*, 392 U.S. 83 (1968). Under their view of that decision, a federal taxpayer (and *a fortiori*, a state taxpayer) has standing whenever his challenge "is directed to an exercise of Congress's [or a state's] taxing and spending power," and "the suit rests on a constitutional

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[2] Moreover, this "injury" is unlikely to be redressed by the relief sought by respondents. First, if respondents' view of the dormant Commerce Clause prevails, the remedy that follows may be simply to invalidate the provisions of the statute that limit the credit to in-state investments, as did the New York Court of Appeals on remand from *Westinghouse*. *See Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 194 (1984). And even if the ITC were struck down *in toto*, respondents acknowledge that this only will cause states to offer a different menu of tax rate reductions or exemptions to businesses (Resp. Br. 47), and thus they concede that invalidation of the ITC will neither reduce their taxes nor provide additional funds for services. This failure of redressability is an independent reason respondents lack Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998).

provision that is a specific limitation on the exercise of [that] taxing and spending power." Resp. Br. 11-12.

Even assuming that, after *Lujan*, *Flast*'s "logical nexus" theory of taxpayer standing remains good law, *see Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 203 (2000) (Scalia, J., dissenting) (noting that its "'logical nexus' analysis" has "fallen into desuetude"), *Flast* cannot assist respondents in this dormant Commerce Clause case. Respondents point to no case *anywhere* that has invoked *Flast* to permit a taxpayer challenge under the Commerce Clause (much less the dormant Commerce Clause). Indeed, respondents themselves concede (at 12) that in the nearly 40 years since *Flast*, "only the Establishment Clause has been recognized," as falling within its "narrow exception" to the "general rule against taxpayer standing." *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988).

Respondents thus candidly seek to extend *Flast* far beyond its historically limited reach—an extension that would grant any taxpayer standing to challenge, under the dormant Commerce Clause, any state tax, even those paid only by *other* taxpayers. They justify this proposed extension of *Flast* solely on the basis that the Establishment Clause and the dormant Commerce Clause share—in respondents' view—"a similar historical role" as "specific limit[s] on discriminatory state taxation." Resp. Br. 13. This expansive exception would certainly swallow the rule against general taxpayer standing; for if the dormant Commerce Clause meets the test for "a specific constitutional limitation" on the government's "taxing and spending power" (Resp. Br. 12-13), then all manner of taxation and spending would fall within the *Flast* exception. Many other provisions in the Bill of Rights limit state (and federal) power to tax and spend. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating state sales tax under the Free Press Clause). And state powers are further circumscribed, both explicitly and implicitly, by constitutional provisions vesting authority in the executive and legislative branches. Respondents offer no reason why their argument would not

similarly extend taxpayer standing to any state tax challenge predicated on a state's alleged interference with the exercise of any enumerated federal power.

Even if, by some principle not apparent from respondents' reasoning, that remarkable expansion could be limited to the Commerce Clause, it would distort the Article III standing requirement beyond recognition. The allegations in this case are fundamentally different in character from those made in *Flast*. In *Flast*, the taxpayer's contention was "that his tax money [was] being extracted and spent in violation of specific constitutional protections against such abuses of legislative power" (392 U.S. at 106); the decision recognized the plaintiffs' "clear stake as taxpayers in assuring that they not be compelled to contribute even 'three pence . . . for the support of any one [religious] establishment.'" *Id.* at 114 (Stewart, J., concurring) (citation omitted); *see also id.* at 106 (majority opinion) (requiring a "nexus" between the alleged illegal conduct and plaintiffs' status as taxpayers). But respondents are not challenging the use of their property to fund a program that violates their rights. *See id.* at 103-04 (noting that the concern of those who drafted the Establishment Clause was that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general"). Rather, their argument is that *others* should be compelled to pay more taxes.

This distinction strikes at the heart of respondents' arguments for taxpayer standing. Though the failure to collect tax revenue might give rise to a cognizable injury to a *competitor*, respondents identify no decision—because there is none—where the Court held that the failure to collect taxes caused an Article III injury-in-fact to *taxpayers* as such.

### C. Respondents' Other Arguments For Standing Are Meritless

Respondents make three additional arguments in support of their standing to pursue a dormant Commerce Clause challenge. First, they contend that they have municipal taxpayer

standing because some of Ohio's franchise tax revenue is remitted to municipalities. *See* Resp. Br. 15-17. But respondents offer no authority for this proposition and none exists. The theory behind municipal standing is that the taxpayer has a "direct and immediate" interest in the actions of the municipal corporation, *Mellon*, 262 U.S. at 486-87, but that theory has no application to a challenged *state* action, especially one that has only an attenuated relationship to the municipal fisc. Under respondents' trickle-down theory of standing, taxpayers may locate injuries in the state-wide impact of state legislation on local revenue. Given the vast array of federal and state programs that provide blocks grants and other funds to municipalities, respondents' theory is one of virtually limitless utility. In any event, respondents' complaint nowhere alleges that the fisc of the City of Toledo is injured by the ITC. *See* J.A. 14a-31a. Respondents allege only that the ITC "depletes the *funds of the State of Ohio* to which Plaintiffs contribute." *Id.* 28a (emphasis added). Respondents cannot here assert standing based on an injury they have not alleged below.

Second, Respondents contend that so long as they have Article III standing to bring their challenge to the City of Toledo's property tax abatement, they have "ancillary" or "pendent" standing to bring any additional claim "that can be spun out of the common nucleus of operative fact." Resp Br. 18-19. This argument, however, is squarely foreclosed by numerous decisions of this Court holding that standing must be analyzed on a claim-specific basis. *See, e.g., Allen v. Wright*, 468 U.S. 737, 752 (1984) ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted") (emphasis added). As this Court explained, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could

bring the whole structure of state administration before the courts for review. That is of course not the law." *Id.*

Finally, respondents argue that this Court's decision in *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996), dictates the waiver of prudential standing requirements in this case. Resp. Br. 27. But that decision is readily distinguished. *Caterpillar* concerned removal jurisdiction—not prudential standing. There, the Court overlooked error in the premature removal of a case when, by the time judgment was entered, the federal courts *had* jurisdiction over the case. *See* 519 U.S. at 73. It was in this context that the Court stated "considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75. Here, respondents do not claim that they fall within the zone of interests of the dormant Commerce Clause. Unlike *Caterpillar* or the other cases cited by respondents, the Court here has an institutional interest in enforcing the prudential requirements for standing. This is because the "zone of interests" requirement ensures that the issues are argued by a "reliable" advocate, rather than a plaintiff whose interests are only "marginally related to or inconsistent with the purposes implicit" in the constitutional or statutory provision on which he or she relies. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12, 399 (1987).[3] Respondents fall into this latter category and therefore have no standing.

For all these reasons, this Court should vacate the judgment below insofar as it invalidates the ITC for lack of stand-

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[3] Respondents also contend that enforcement of the prudential standing requirements would be "fundamentally unfair" in view of petitioners' arguments below that respondents had standing. Resp. Br. 27. But when DaimlerChrysler made that argument, it did so on the basis of the unique claims of injury arising out of the seizure of Kim's Auto's property. *See* C.A. J.A. 200-01. Respondents have since abandoned any claim based on Kim's Auto, apparently recognizing themselves that those injuries became unredressable no later than the close of the eminent domain proceedings. Respondents' claims of unfairness thus ring hollow.

ing and remand the case to the courts below with instructions that the ITC claim be dismissed.[4]

## II. RESPONDENTS' EXPANSIVE VISION OF THE DORMANT COMMERCE CLAUSE CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS

Respondents' central contention is that the dormant Commerce Clause bars all state "measure[s] that provide[] preferential tax treatment,"—*i.e.*, "a lower effective tax rate"—"conditioned on in-state economic activity." Resp. Br. 9. This contention, however, finds no support in this Court's dormant Commerce Clause jurisprudence. Of course, as the late Chief Justice acknowledged, that jurisprudence has not been a model of clarity or consistency, *see Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) ("[T]he jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused"), and the language employed in some of its opinions may, from time to time, have been more expansive than the holdings of those decisions.

It is thus possible, as respondents demonstrate, to assemble a collection of out-of-context phrases to support the propositions that the dormant Commerce Clause bars all "incentive[s] 'to invest . . . within [the State] rather than to invest . . . in other States,'" Resp. Br. 42 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 757 (1981)), as well as "an[y] attempt to provide a positive incentive for increased business

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[4] Respondents' suggestion (at 28) that the "appropriate remedy is a remand of the case to the Ohio state courts," is strange in light of their separate challenge to the City of Toledo's property tax abatement. *See Cuno v. DaimlerChrysler Corp.*, No. 04-1407, Pet. for Certiorari (filed Apr. 18, 2005) (presenting question whether Sixth Circuit correctly decided that City of Toledo's property tax abatement did not violate the Constitution). As respondents note (at 18), under *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165-66 (1997), removal was appropriate even if only the property tax claim was within the federal court's jurisdiction. Remand to the state courts would therefore be appropriate only if this Court determines that the district court also lacked jurisdiction over respondents' other federal claim, an argument pressed by no party.

activity in [the State]." Resp. Br. 41 (quoting *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 393 (1984)). But the *holdings* of those cases do not advance any proposition nearly so broad, and the Court has repeatedly made clear that the States are free to take all manner of steps, including the use of their taxing and spending powers, to encourage local investment and development. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). A close examination of the *facts* of the cases cited by respondents demonstrates that the dormant Commerce Clause bars only state action that burdens, *i.e.*, imposes a cost upon, interstate commerce and does so in a manner that discriminates against out-of-state actors or transactions. This Court has never found a dormant Commerce Clause violation where state action only reduces the cost of in-state economic activity, and respondents suggest no reason tethered to the text or history of the Commerce Clause to do so now.

### A. Respondents' View of the Dormant Commerce Clause Would Endanger Nearly Every Manner of State Economic Development Program

The cornerstone of respondents' dormant Commerce Clause argument—and the Sixth Circuit's holding below—is that there is no constitutional distinction to be made between a state law that penalizes out-of-state actors or conduct, and a state law that accords benefits to in-state actors or conduct. *See* Resp. Br. 39-40; Pet. App. 9a. Indeed, respondents ridicule any such distinction as advancing a "triumph of form over substance," claiming that, at least in the realm of economic action, every state-provided benefit necessarily carries with it a corresponding penalty that is visited on those ineligible for the benefit. Resp. Br. 43; *see also* Pet. App. 10a ("economically speaking, the effect of a tax benefit or burden is the same"). Accordingly, in respondents' view, the dormant Commerce Clause bars state action that "advantage[s] in-state economic activity." Resp Br. 1.

Respondents' view, however, cannot be reconciled with this Court's long-held view that "[d]irect subsidization of

domestic industry does not ordinarily run afoul of [the Commerce Clause]." *New Energy*, 486 U.S. at 278; *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (noting that "[the business] remain[s] within Maryland in response to market forces, including that exerted by money from the State."). Recognizing this, respondents now shrink even from using the word "subsidies." This is peculiar because a subsidy is surely the most direct of "advantages" a state can provide to in-state economic actors, and, at least until the case reached this Court, exactly what the respondents alleged the ITC to be. *See* J.A. 28a. Respondents instead now recast the ITC as a "discriminatory tax preference[] favoring in-state business location." Resp. Br. 1.

Innocuous though it may seem, respondents' newly minted terminology is an essential component of their argument. It is only by disavowing their earlier acknowledgment that the ITC was, in form and effect, a subsidy, that respondents can now argue that their expansive view of the dormant Commerce Clause is sufficiently cabined and "leaves wide latitude for state programs in support of economic development." Resp. Br. 48. Respondents contend that their version of the dormant Commerce Clause would ban only "preferential tax treatment conditioned on in-state economic activity," *id.* 9—more specifically, "'any provision that reduces the taxpayer's 'effective [in-state] tax rate' as the taxpayer engages in more in-state activity.'" *Id.* 41 (quoting Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 815 (1996)). And though they remain silent on the topic of direct subsidies, respondents suggest that, under their view, not only across-the-board tax cuts, but also programs "ranging from worker training and infrastructure construction to low interest loans" all remain immune from dormant Commerce Clause attack. Resp. Br. 48.

Thus, ironically, even as they disparage as "formalistic" any distinction between benefits and burdens, respondents place great reliance on a formalism of their own design—a distinction between "tax breaks," on one hand, and other

forms of cash and non-cash benefits provided by states to assist local industry, on the other. This distinction, though, is illusory. The ITC is a one-time subsidy available to any company, whether or not already doing business in Ohio, that is willing to build a plant or otherwise increase its capital investment. To be sure, the ITC will lower a firm's "effective tax rate," but it is obvious enough that a cash subsidy can do so just as surely and effectively. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) ("effect [of tax] on Massachusetts producers is entirely . . . offset by the subsidy"). It is merely a question of accounting. More importantly, though, respondents fail to offer any cogent rationale why a tax benefit that operates in the same manner as a direct subsidy—a benefit simple for in-state activity—should be treated any differently.[5]

The one supposed "practical" difference respondents offer is "the relative ease with which tax breaks can be enacted and the difficulty and complexity of enacting expenditure programs." Resp. Br. 48-49 (citing Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 480-81 (1989)). Even if respondents' highly questionable political theory were to be accurate with regard to tax credits,[6] respondents suggest no reason why such "practical"—in fact, nakedly political—considerations have any value whatsoever in inter-

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[5] *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589-590 (1997), also is of no assistance to respondents. *Camps Newfound* relied on Establishment Clause precedent to establish the distinction between a cash payment and the exemption from a generally applicable "burden of property taxation." Id. at 50 n.24 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). But as nearly contemporaneous Establishment Clause cases demonstrate, tax *credits*—unlike exemptions—are indistinguishable from subsidies. *See, e.g., Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 789-90 (1973).

[6] To support their theory, respondents rely solely on a law review article that, in turn, relies principally on a magazine article from 1988. *See* Coenen, *supra*, at 481 n.485 (citing *Spending by Not Taxing*, The Economist, Jan. 23, 1988, at 51).

preting the Constitution. If there is a constitutionally significant difference between subsidies to attract investment and tax credits to attract investment, it cannot be found merely in a theory that subsidies, for some reason, in some states, under some circumstances, might be more difficult to dispense.

There is thus no basis for respondents' proposed categorical distinction between tax credits and subsidies (and similar non-cash benefits) provided by states. Accordingly, the limiting principle respondents attempt to erect in reliance on that distinction collapses of its own weight. If it is true that the benefit from the ITC creates a burden on businesses that invest outside Ohio, then other benefits to domestic industry—be they subsidies, stadiums, or even schools—also impose burdens on interstate commerce, and would be improper under respondents' sweeping vision of the dormant Commerce Clause. Contrary to respondents' assertions, the legal principle they espouse cannot be cabined simply to "preferential tax breaks," and this no doubt explains their efforts to abandon the use of the word "subsidy."

Respondents' vision of the dormant Commerce Clause would all but obliterate the limitation this Court placed on its sweep in *Boston Stock Exchange*, there holding that nothing in that Clause "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." 429 U.S. at 336. Under respondents' proposed expansion, the States' "police powers" to "encourag[e] domestic industry," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984), would be supplanted by "national control[]" over local economies, Resp. Br. 1, a notion at war with the very concept of a federal system of government.

### B. The Ohio ITC Does Not Violate the Dormant Commerce Clause, Because It Does Not Impose A Burden On Interstate Commerce

Respondents argue that any state measure that provides a "lower effective tax rate . . . conditioned on in-state economic activity" violates the dormant Commerce Clause.

Resp. Br. 9. This theory must be rejected. In the realm of taxation, a lower effective tax rate for in-state actors is a necessary, but not a sufficient, condition for a dormant Commerce Clause violation. Both the text of the Commerce Clause and this Court's cases demonstrate that a state tax must also impose additional costs upon—and thus burden—out-of-state activity before a violation can be found.

Respondents deem this description of the reach of the Commerce Clause "novel," Resp Br. 39, and "radical," *id.* 44, but that is wrong. This Court has consistently adhered to this basic limitation. *See New Energy*, 486 U.S. at 273 (dormant Commerce Clause "prohibits . . . regulatory measures designed to benefit in-state economic interests *by burdening out-of-state competitors*") (emphasis added); *see also Oregon Waste Sys., Inc. v. Dept' of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994) (dormant Commerce Clause bans differential treatment of in-state and out-of-state economic interests that benefits the former *and burdens the latter*") (emphasis added). And respondents concede as much, for nowhere do they argue that the dormant Commerce Clause implicates state measures that do *not* burden interstate commerce.

The relevant question here is simply whether the operation of Ohio's franchise tax and ITC, regulates decisions to invest out-of-state by imposing financial burdens on such investments. Respondents contend out-of-state investments are so burdened by Ohio's franchise tax because it is "a tax on the apportioned share of the total income earned by corporations through the operation of an interstate business," and because even though such an investment will necessarily "reduce the share of the company's total income that is apportioned to Ohio, a substantial proportion of the income earned through that new [out-of-state] investment is still likely to be apportioned to Ohio." Resp. Br. 44, 45 n.13. If true, this would call into question the constitutionality of not just the ITC but the franchise tax itself. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) ("[A] State may not, when imposing an income-based tax, 'tax value

earned outside its borders.'" (quoting *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982)).

But it is not true, and the very example that respondents herald in their brief demonstrates as much. *See* Resp. Br. 35 n.15 (citing Br. of Center on Budget and Policy Priorities (CBPP) as Amicus Curiae in Support of Respondents at A-1-A-7). In that example, before the "ABC Corp." made its out-of-state investment, it owed $39,100 in Ohio franchise tax. *See* CBPP A-1.[7] After ABC built its out-of-state plant, under the example's assumptions, ABC's tax liability to Ohio (at the same 8.5% rate), remained exactly at $39,100, *even though net income increased by 50%. See id.* A-5. The new income generated by the investment was attributed only to the State in which it was built; *none* of it was attributed to (and, thus, burdened by) Ohio. This demonstrates that under many (if not all) circumstances Ohio's franchise tax does not reach the income generated by out-of-state investments. This is sufficient to defeat respondents' facial challenge to the ITC. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

Moreover, respondents are clearly wrong when, defying common sense, they assert that "many" of the tax-and-credit schemes invalidated by the Court involved taxes that did not impose burdens upon the out-of-state conduct that was supposedly the object of the state's discrimination. Resp. Br. 45. *Westinghouse* certainly was not such a case. There the Court struck down a tax credit that depended on the ratio between in-state and out-of-state activity. *See* 466 U.S. at 400-02 & n.9. The Court recognized that because the tax credit was reduced when out-of-state activity increased—even when in-state conduct remained constant—the New York scheme had the "most pernicious effect" of "penaliz[ing] increases in the DISC's shipping activities in other States." *Id.* at 401 & n.9. The reduction of the New York tax credit functioned effec-

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[7] ABC Corp. starts with all of its property, all of its payroll and one-tenth of its sales in Ohio. CBPP Br. A-1. The resulting Ohio apportionment value of 0.46, when multiplied by both ABC's net income ($1 million) and the Ohio tax rate of 8.5%, yields an Ohio tax of $39,100.

tively as a New York tax on out-of-state activity; it raised the cost of doing business out-of-state.[8]

So, too, in the other cases cited by respondents. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), and *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), both invalidated exemptions from state property taxes: in *Camps Newfound*, an exemption from a Maine tax on real property that was fully available to non-profit entities unless they operated principally for the benefit of non-residents of the State, *see* 520 U.S. at 568-69, and in *Fulton Corp.*, an exemption from a tax on the value of corporate stock that was tied to the extent to which the stock issuer did business in North Carolina, *see* 516 U.S. at 328. In each case, the Court reasoned that because the tax exemption—like the DISC credit in *Westinghouse*—was reduced or revoked when the taxpayer engaged in business outside the State or with out-of-state actors, the tax exemption discriminated against interstate commerce. *See Camps Newfound*, 520 U.S. at 568-69; *Fulton Corp.*, 516 U.S. at 333. And contrary to respondents' suggestion (at 45) that these property taxes did not impose burdens on out-of-state conduct, the underlying property taxes manifestly applied—indeed, only applied—to

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[8] Respondents' suggestion that this "pernicious effect" was unnecessary to the holding in *Westinghouse* because the Court was "focused primarily on the benefits provided for New York activity," Resp. Br. 41, and that, by implication, the Court would have struck any tax credit that reduced an in-state exporters' effective tax rate, defies any fair reading of the Court's decision. *See Westinghouse*, 466 U.S. at 400 ("It is this *second adjustment, made only to the credit* and not to the base taxable income figure, that has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISCs' shipping activities conducted from New York." (emphasis added)). It is further belied by the state court's actions on remand, where it severed only the portion of the tax credit formula that measured the ratio of in-state DISC activity to out-of-state DISC activity, effectively extending the DISC credit "to all of the DISC accumulated income attributable to the parent corporation, without regard to the exports' place of shipment." *See Westinghouse Elec. Corp.*, 63 N.Y.2d at 194.

those businesses that elected to engage in interstate commerce, notably among them, the plaintiff in each action.

In cases involving taxes on transactions, the out-of-state burdens are even more obvious. For instance, in *Maryland v. Louisiana*, the Court struck down Louisiana's "first-use tax" on natural gas transported into the State from the outer-continental shelf where offsetting credits were granted only to Louisiana residents. *See* 451 U.S. at 754-760. Louisiana's first-use tax thus was paid only by out-of-state gas consumers and thus functioned as a tax on interstate commerce itself. Respondents' notion that these taxes did not impose burdens on interstate commerce is clearly wrong.

In short, respondents thus have no answer to the argument that a state tax does not violate the dormant Commerce Clause unless—at a minimum—it imposes actual burdens upon the out-of-state conduct against which the tax supposedly discriminates. And Ohio's ITC simply does not impose any burdens on out-of-state activity. Indeed, respondents concede that it has little or no effect on business decisions because other State remain free to enact—and have enacted—comparable provisions, Resp. Br. 1. Thus, the ITC cannot be said to "coerc[e]" businesses to invest in Ohio, as the Sixth Circuit incorrectly held. Pet. App. 6a. The ITC does not penalize or otherwise burden a company for investing out of state and therefore does not violate the Commerce Clause.

In the end, it is respondents, not DaimlerChrysler, who elevate "form over substance." Resp. Br. 43. It is beyond dispute that Ohio could have reimbursed DaimlerChrysler for a portion of its capital improvements at the Stickney Avenue plant, or could have made a cash payout contingent on the company keeping its Jeep assembly plant in Ohio, and neither offer would have regulated or burdened DaimlerChrysler's decision to invest elsewhere had it ultimately done so. For this same reason, Ohio's offer of an ITC to companies that make a capital investment does not regulate or burden interstate commerce. Respondents' contention to the con-

trary is disproved by their own example. This Court accordingly should find that the ITC operates solely as a subsidy to in-state investment, and should reject respondents' suggestion that such an in-state benefit necessarily creates out-of-state burdens.

### C. Respondents Fail to Demonstrate That Ohio's ITC Discriminates Against Interstate Commerce

Even if this Court were to accept respondents' contention that the benefit the ITC accords to in-state investors itself reflexively imposes a burden on out-of-state investors, such a burden violates the dormant Commerce Clause only if it constitutes discrimination against interstate commerce. The ITC does not.

Respondents do not dispute that a finding of discrimination against interstate commerce requires a predicate finding that in-state and out-of-state actors are similarly situated. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). Respondents also do not dispute that a corporation that invests in-state is not similarly situated, vis-à-vis the underlying franchise tax, to one that invests out-of-state. They acknowledge that when a firm invests in-state, it increases its Ohio apportionment value and, thereby, its exposure to Ohio's franchise tax, while a corporation with an Ohio presence that invests out-of-state decreases its Ohio apportionment value and its exposure to Ohio tax. Resp. Br. 34. Respondents contend, though, that this is an insufficient basis to justify different treatment of in-state and out-of-state investors. They argue, in essence, that in-state and out-of-state investors are situated similarly enough for dormant Commerce Clause purposes, even if not for other purposes.

In support of this argument, Respondents first contend that this Court, in *Westinghouse*, "directly rejected precisely th[e] argument" that differences in apportionment value can justify different treatment. Resp. Br. 34 (citing *Westinghouse*, 466 U.S. at 400-02 n.9). Respondents are wrong. Though the Court noted that it was "not unmindful" of the fact that increased in-state business activity results in a

higher apportionment value, the Court did not conclude that such differences, as a categorical matter, foreclosed different treatment. This is unsurprising because the "similarly situated" argument was not raised in *Westinghouse*—not by the State of New York and not by its amicus, the State of California. *See Westinghouse Elec. Co.*, No. 81-2394, Br. of Appellees (NY Br.); *id.* Br. of the State of Cal. as Amicus Curiae in Supp. of Br. of James H. Tully, Jr. (CA Br.); *see also Westinghouse*, 466 U.S. at 400 (corporations were "similarly situated in all respects except for the percentage of their DISCs' shipping activities conducted from New York").[9] This Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll. v. Katz*, No. 04-885, slip op. at 5 (Jan. 23, 2006) (citing *Cohens v. Virginia*, 6 Wheat. 264, 399-400 (1821)).

Finally, even if this Court finds the differences between in-state and out-of-state investors to be insubstantial, the out-of-state investors still suffer no coercion. To be sure, Ohio's ITC is available only to those who choose to invest in Ohio. But as respondents themselves state, these investment tax credits have "minimal impacts on business decisions, largely because most jurisdictions offer comparable tax breaks." Resp. Br. 1. Because of the widespread availability of these credits—a product of healthy competition among the states to create attractive investment environments—Michigan's investment tax credit did not impose an unconstitutional burden on DaimlerChrysler's decision to locate its Jeep plant in Ohio, any more than Ohio's ITC imposed a burden on its decision to expand its engine plant in Detroit, or its decision in December 2005 to invest $1 billion in two Missouri plants. *See* Gregory Cancelada, *Chrysler Will Invest $1 Billion at Fenton*, St. Louis Post-Dispatch, Dec. 13, 2005, at A1 (not-

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[9] Rather New York and its *amicus* relied principally on the assertion that "New York taxes only the income reasonably allocated to it." *See* NY Br. 8; CA Br. 9 ("New York is taxing only New York income."). For the reasons explained above this assertion was not true.

ing various state and local tax incentives totaling more than $75 million). In choosing where to locate investments, companies like DaimlerChrysler make rational economic choices among states (and foreign countries) that remain free to include tax credits and other tax breaks to reduce the cost of doing business in their locale. It is difficult, to say the very least, to divine "economic Balkanization" from a regime in which states are permitted to compete with each other to provide the best economic inducements for investment.

## CONCLUSION

The judgment of the court of appeals should be vacated in relevant part and the case should be remanded with instructions that the respondents' federal challenges to Ohio's ITC be dismissed. Should the court reach the merits, the judgment of the court of appeals should be reversed in relevant part.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
*Petitioners*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

WILLIAM W. WILKINS, *et al.*,
*Petitioners*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* ALPHAGENICS, INC., GREATER BALTIMORE TECHNOLOGY COUNCIL, MDBIO, INC., TECHNOLOGY COUNCIL OF MARYLAND, UPSTATE VENTURE ASSOCIATION OF NEW YORK, INC., AND 20/20 GENESYSTEMS, INC. IN SUPPORT OF PETITIONERS

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**BRIEF OF *AMICI CURIAE* ALPHAGENICS, INC., GREATER BALTIMORE TECHNOLOGY COUNCIL, MDBIO, INC., TECHNOLOGY COUNCIL OF MARYLAND, UPSTATE VENTURE ASSOCIATION OF NEW YORK, INC., AND 20/20 GENESYSTEMS, INC. IN SUPPORT OF PETITIONERS**

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## STATEMENT OF PARTIES SUPPORTED BY THIS BRIEF

This Brief *amicus curiae* is filed in support of the Petitioners.[1] The opinion of the United States Court of Appeals for the Sixth Circuit (the "Court of Appeals") is reported at 386 F.3d 738 (6th Cir. 2004). Petitioners DaimlerChrysler Corporation and Wilkins, et al., have consented to the filing of this Brief pursuant to letters of Consent to the Filing of Amicus Briefs in Support of Either Party lodged with the Clerk on October 24, 2005. Respondents have consented to the filing of this Brief pursuant to a letter of consent on file with the Clerk.

## IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici* include associations of companies and other interested groups engaged in bioscience-based businesses and high technology and those comprised of potential investors in such enterprises. The membership of the Technology Council of Maryland and the Greater Baltimore Technology Council includes not only publicly traded multinational companies but also companies in technology incubators engaged in cutting-edge innovation in fields such as biotechnology, information technology, software, nanotechnology, and advanced materials. The mission of the nonprofit MdBio, Inc. is to unify, empower and advance Maryland's bioscience industry, promoting

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[1] In accordance with rule 37.6, Counsel for the *amici* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief. University of Maryland School of Law students David Blazina, Aimée Drouin, Oliver Edwards, Kristine Grigorian, Joanne Hawana, Phillip Heller, James Knight, Winston Martindale, Enyinnaya Obi, Kelley Walsh, and Yue Zhu, student attorneys at the Maryland Intellectual Property Legal Resource Center, assisted in the preparation of this Brief.

corporate and economic development. AlphaGenics, Inc. and 20/20 Genesystems, Inc. are two emerging technology companies located at the Maryland Technology Development Center in Rockville, Maryland.

Maryland enacted the Biotechnology Investment Incentive Act in 2005. This Act provides limited income tax credits to investors in Maryland biotechnology companies. 2005 Md. Laws ch. 99. On April 28, 2005, the Attorney General of Maryland wrote to the Governor stating that the then-proposed legislation might violate the Commerce Clause.[2] Although the letter asserted that the decision of the Court of Appeals in this action was "not relevant to the issues raised by House Bill 664" as it then existed,[3] it also declared, "The *Cuno* case is the most far-reaching . . . in that it reaches tax credits available to out-of-state companies based on activities and job creation in the State . . . ."[4] The Attorney General's letter raises the distinct possibility that the decision of the Court of Appeals could result in invalidating the Maryland statute even if the Legislature addressed the issues the letter identified. This prospect has had an unsettling effect on the investment climate for early-stage biotechnology companies in Maryland.

Fledgling biotechnology companies experience enormous cash "burn rates" and encounter lengthy delays to commercialization because of the need to obtain patent protection and regulatory approvals. The decision of the Court of Appeals has cast a substantial cloud over the tax incentives that Maryland and most other states use to enhance their economic futures and promote innovation by nurturing their home-grown emerging technology companies and

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[2] Letter, dated April 28, 2005, from J. Joseph Curran, Jr., Attorney General of Maryland, to Governor Robert L. Ehrlich (attached as Exhibit).

[3] *Id.* at 3, note 3.

[4] *Id.*

reducing the risk to potential investors. There is a substantial probability that the uncertainty engendered by the decision below will exacerbate the already difficult task of emerging yet fragile enterprises such as AlphaGenics and 20/20 to raise capital from the private equity markets.

The Upstate Venture Association of New York, Inc. ("UVANY") is a group whose membership includes venture capital firms, private equity investors and financial institutions from New York and other states interested in promoting deal flow and investment in technology companies across New York. UVANY has member firms that have already invested or are considering investing in such companies.

In 2005, New York enacted a refundable research and development tax credit. 2005 N.Y. Laws ch. 61. UVANY is concerned that affirmance of the decision of the Court of Appeals will put the New York development tax credit and other tax measures designed to assist early-stage technology companies in New York at serious risk.

## SUMMARY OF ARGUMENT

Innovation is expensive, and funding is its life-blood. Without resources to allow emerging technology companies to press forward with the development of new products and services to meet important societal needs, entrepreneurship and the engine for job creation it represents would be dealt a severe blow. Maintaining the lead that the United States currently enjoys in technology innovation against growing foreign competition is an important national priority. Many states, including Maryland and New York, have staked their economic futures and invested vast sums in achieving and maintaining leadership in this increasingly vital sector of the economy. Entrepreneurship has become an important component of business, engineering, and other academic

programs,[5] and venture capital and angel investing can now be found in many developed and developing countries.[6]

Against this backdrop of increasing interest in and support for technology commercialization, and the emerging companies at the forefront of these efforts, Respondents' suit represents a frontal assault on all state tax credit mechanisms used for economic development purposes. In the words of one of the architects of this action, it represents "pathbreaking litigation to combat corporate welfare."[7] However, in attacking a non-discriminatory economic development program used by the vast majority of states, this "pathbreaking litigation" suffers from two fatal flaws.

As an initial proposition, but one that disposes of this action completely, Respondents, with their attenuated interests and hypothetical and speculative injuries and unlikelihood of obtaining redress by a favorable decision, lack standing under Article III to avail themselves of the judicial power of the United States to challenge the Ohio statute.

Secondly, even if this Court were to find that any of the Respondents has standing, Respondents ask this Court to stray from its traditional case-by-case analysis of dormant Commerce Clause cases in at least two ways: First, the

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[5] *See, e.g.*, Jim Hopkins, *Venture capital 101: Entrepreneur courses increase*, USA TODAY, Jan. 5, 2004 (Ewing Marion Kauffman Foundation recently awarded $25 million to eight U.S. universities pledging to spread entrepreneurship education beyond business classrooms), at 1B, *available at* 2004 WLNR 6209380.

[6] *See, e.g.*, Jitendra Uttam, *Convergence of Finance, Technology and Entrepreneurship: The Role of Liberal Financial System in the Making of India's New Economic Growth Regime*, JOURNAL OF INTERNATIONAL AND AREA STUDIES, § 6 (June 1, 2005), *available at* 2005 WLNR 14739829.

[7] Northeastern School of Law Faculty website profile of Peter D. Enrich *at* http://www.slaw.neu.edu/faculty/f_enrich.htm, last viewed Nov. 23, 2005.

Respondents are asking this Court to act as a super-legislature to judge the wisdom of state tax credits as economic development incentives. Although this subject is open to debate, this Court has stated repeatedly that the state Legislatures are the proper forums to make such decisions. *See, e.g., Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (concluding "[o]ur recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). Indeed, the rationale behind this action runs counter to the notion this Court has expressed numerous times that the states are laboratories and should be given wide latitude to fashion innovative programs that meet their particular needs. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (holding "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").

Notwithstanding these fatal defects in Respondents' strategy, the mere fact that they have brought this suit inevitably raises serious questions about the legal status of state tax credit programs and contributes to an environment of uncertainty among entrepreneurs and investors alike. To the extent that this atmosphere increases the risk of failure to fragile emerging companies, innovation will suffer.

The interests of the members of *amici* associations that are large companies have been expressed persuasively in the Briefs for Petitioners and in other *amicus* Briefs. This Brief, therefore, will concentrate on the unique considerations of the emerging technology community. Nevertheless, all members of the *amici* associations benefit from the presence in their states of vibrant, well-funded emerging technology companies.

## ARGUMENT

### I. Respondents Do Not Have Standing to Challenge Ohio's Investment Tax Credit.

This Court, *sua sponte*, directed the parties to brief and argue, "Whether respondents have standing to challenge Ohio's investment tax credit, OHIO REV. CODE ANN. § 5733.33." *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005). Thus, this Court has made standing a critical threshold question in deciding this action.

Under Article III, standing emanates from the "case or controversy" requirement and the separation of powers. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The federal courts may exercise power "only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen*, 468 U.S. at 752 (alteration in original); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To establish standing under Article III, Respondents must demonstrate that they have suffered an injury in fact, that they are within the zone of interests protected by the Commerce Clause, and that it is likely that a favorable decision will provide redress to Respondents. Respondents fail under all three prongs. *Associated Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970); *Lujan*, 504 U.S. at 561.

#### A. Respondents Have Not Suffered an Injury In Fact.

First, each of the Respondents must show that he or she has suffered an "injury in fact, economic or otherwise," caused by the Ohio investment tax credit that would constitute an invasion of a "concrete and particularized"

legally protected interest. *Associated Data Processing*, 397 U.S. at 152; *Lujan*, 504 U.S. at 560. Respondents claim injury as taxpayers because the Ohio investment tax credit has purportedly led (or will lead) to a reduction in funding for the City of Toledo and the local school systems. Compl. ¶ 22. However, the Commerce Clause does not eclipse the reserved power of the states to tax for the support of their own governments and to deploy resources within the states as their legislatures deem necessary. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 42 (1824). Respondents merely contend that they are injured by the investment tax credit, but in vague, hypothetical, and generalized ways. Their Complaint does not allege any particularized injury necessary to establish a basis for standing.[8]

Significantly, Peter Enrich, who briefed and argued the case on behalf of the Respondents in the Court of Appeals, has conceded that taxpayers bringing these types of claims against state tax incentives would have only an "attenuated" interest in the outcome of such litigation. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 413 (1996). ("Whereas a business plaintiff can claim a direct and particularized interest in the outcome . . . the citizen/taxpayer plaintiff's interest is more attenuated.")[9]

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[8] The Michigan Respondents claim injury in fact because of some possibility that absent the Ohio investment tax credit, OHIO REV. CODE ANN. § 5733.33, the Petitioner might have located its factory in Michigan. Compl. ¶ 42. Michigan Respondents have no nexus with Ohio. The Michigan Respondents' alleged injury is entirely speculative and even less particularized than the injury alleged by the Ohio Respondents.

[9] Respondent Kim's Auto and Truck Service, Inc. claims injury in fact by alleging that without Ohio's investment tax credit, the Petitioner would not have expanded its Toledo plant. Compl. ¶ 41. This Respondent's business was displaced because of the expansion. However, a jury awarded Kim's $104,000 as compensation in Kim's takings case against

### B. Respondents Are Not Within the Zone of Interests Protected by the Commerce Clause.

Even assuming *arguendo* that Respondents had sustained an injury in fact, the second prong of the standing standard rests on whether the investment tax credit "provision [was] intended to benefit the putative plaintiff." *Dennis v. Higgens*, 498 U.S. 439, 449 (1991). Respondents allege that the Ohio investment tax credit violates the dormant Commerce Clause. However, the "very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). "The [Commerce] Clause was intended to benefit those who . . . are engaged in interstate commerce." *Dennis*, 498 U.S. at 449. Respondents do not allege that they are engaged in interstate commerce. The Commerce Clause does not permit states to enact taxes that "discriminate[] against interstate commerce . . . by providing a direct commercial advantage to local business." *Bacchus Imps. v. Dias*, 468 U.S. 263, 268 (1984) (ellipsis in original) (quoting *Boston Stock Exch.*, 429 U.S. at 329). "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce – from wholesaler to retailer to consumer – is invalid, because a burden placed at any point will result in a

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the City of Toledo. *City of Toledo v. Kim's Auto & Truck Service, Inc.*, No. L-02-1318, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003). Kim's appealed to the Ohio Court of Appeals, which rejected Kim's "public use" argument and affirmed the jury award. *Id.* The Supreme Court of Ohio and then this Court denied further review. *Toledo v. Kim's Auto & Truck Serv., Inc.*, 101 Ohio St. 3d 1469, 804 N.E.2d 42 (2004); *Kim's Auto & Truck Service, Inc. v. City of Toledo, Ohio*, 125 S. Ct. 2988 (2005). Kim's has fully litigated its takings case and has thus obtained complete relief for any injury. Even if this Court were to grant the relief the Respondents seek, Kim's business would not be restored to its previous location and status.

disadvantage to the out-of-state producer." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994).

Unlike Respondents, the plaintiffs who challenged the New York stock transfer tax in *Boston Stock Exchange* had "assert[ed] their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they alleg[ed] that the transfer tax indirectly infringes on that right." *Boston Stock Exch.*, 429 U.S. at 321. The stock transfer tax was within the "zone of interests" protected by the Commerce Clause because the differential cost of the tax depended on the geographic location of the stock exchange as well as the location of the owner of the stock. *Id.* The Ohio investment tax credit is available and equally applied to both in-state and out-of-state businesses. Because Respondents have no connection with the stream of commerce, they do not fall within the zone of interests protected by the Commerce Clause.

### C. Any Redress of Respondents' Alleged Injuries is Purely Speculative.

Finally, to establish standing under Article III, Respondents must demonstrate that their injury will "likely be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Even if this Court were to affirm the decision of the Court of Appeals, there is no assurance that the allegedly adverse consequences emanating from the tax credit would be remedied. Respondents have suffered no injury in fact, do not fall within the zone of interest protected by the Commerce Clause, and any chance of redressability appears speculative at best.

At a constitutional minimum, Respondents need to establish all three elements of standing before the merits are reached. *Lujan*, 504 U.S. at 560. In fact they are able to meet

none of them. Because standing in the constitutional sense is an essential prerequisite for the exercise of federal judicial power under Article III, the absence of standing by the Respondents is sufficient in itself for this Court to reverse the judgment of the Court of Appeals and direct that this action be dismissed.[10] *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973).

## II. Ohio's Investment Tax Credit Is Compatible with the Commerce Clause Because It Is a Non-Discriminatory Initiative to Encourage Investment in the State.

If this Court determines that any of the Respondents has standing to challenge the Ohio investment tax credit, this Court will address the merits of the decision of the Court of Appeals that held that the tax credit violates the dormant Commerce Clause. For the reasons that follow, that decision is wrong and should be reversed.

### A. The Court of Appeals Misapplied the Decisions of this Court in Invalidating Ohio's Investment Tax Credit.

The Constitution grants Congress the exclusive right to regulate interstate and foreign commerce. U.S. CONST. art. I, § 8, cl. 3. This Court has interpreted the negative or "dormant" portion of the Commerce Clause to limit a state's

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[10] Ohio's standards for conferring standing follow those that this Court has enunciated for the federal courts. *See, e.g., State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469-70, 715 N.E.2d 1062, 1081 (1999), ("In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury."). It is thus apparent that Respondents lacked standing to bring this suit in the Ohio courts, as they had done originally.

ability to regulate interstate commerce. A state tax is allowed only when the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). Although the dormant Commerce Clause does not prohibit a state from regulating business within the state, it does restrict a state from engaging in economic protectionism such as unfair taxation of out-of-state transactions.

This Court has repeated consistently that the Commerce Clause constrains a state from regulating commerce in a way that creates barriers to commerce outside the state. *See, e.g., GMC v. Tracy*, 519 U.S. 278, 287 (1997). Yet this Court has also been careful not to tie the hands of states in exercising their taxing powers to promote in-state economic development or to provide special incentives to investment in disadvantaged areas or to targeted sectors of the economy. "We have acknowledged that the delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requires a case-by-case analysis and that such analysis has left 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (quoting *Boston Stock Exch.*, 429 U.S. at 329).

The absence of a precise guide and the adoption by this Court of a careful case-by-case analysis is manifest in the cases the Court of Appeals has cited in its opinion. *See Cuno v. DaimlerChrysler Corp.*, 386 F.3d 738, 744-45 (6th Cir. 2004). The Court of Appeals relied heavily on *Boston Stock Exchange*, in which this Court declared that a New York statute that imposed a greater tax liability on out-of-state stock transactions violated the Commerce Clause. While

holding that the New York statute unduly burdened interstate commerce, this Court was careful to state, "[o]ur decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." 429 U.S. at 336. This Court emphasized that a state tax credit must be nondiscriminatory by stating, "[w]e hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 337.

Indeed, this Court has been careful not to limit a state in assisting the growth of in-state industry and commerce. Lower tax rates have been specifically mentioned as permitted incentives: "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994); *see also Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) ("a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence."); *id.* at 72, note 1 (O'Connor, J., concurring) ("a State might enact a tax credit for citizens who contribute to the State's ecology by building alternative fuel sources or establishing recycling plants."); *Bacchus Imps.*, 468 U.S. at 271 ("[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (per curiam) (restating that promotion of local industry is a legitimate state interest in the Commerce Clause). Nevertheless, the Court of Appeals failed to address this point, focusing instead only on the permissibility of direct subsidies to businesses. *Cuno*, 386 F.3d at 746.

The purpose of the Commerce Clause is not to limit a state's ability to effect policies to promote industry and economic growth within the state, but rather to limit a state's ability to affect interstate commerce by discriminatory taxation. The language and concept of burdened and benefited parties is derived from *Bacchus Imps.*, 468 U.S. at 273. The Court of Appeals quoted from *Bacchus Imports* in support of its decision: "The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party." *Id.* at 273. However, this quotation by the Court of Appeals omitted the next sentence—one which provides a limit to that determination of constitutionality: "A discrimination claim, by its nature, requires a comparison of the two classifications." *Id.* at 273. A comparison allows investigation into one of the factors articulated in *Complete Auto Transit*, the discriminatory effect on interstate commerce of a tax statute.

Unlike the New York stock transfer tax in *Boston Stock Exchange*, which unduly burdened out-of-state transactions, the Ohio investment tax credit benefits all transactions taking place within Ohio. The Court of Appeals did not compare the benefited and burdened parties. Rather, it simply reached a categorical conclusion that tax credits involve regulation of interstate commerce, and thus violate the dormant Commerce Clause. This comparison, which the Court of Appeals failed to make, is crucial for emerging technology companies because they are legitimate beneficiaries of direct or indirect in-state economic development incentives to promote their growth and prosperity and to create jobs.

### B. The Dormant Commerce Clause Does Not Foreclose Ohio's Investment Tax Credit or Any Similar Tax Credit Legislation.

*Boston Stock Exchange* does not contemplate a prohibition on tax incentives as broad as the Court of Appeals adopted. *Boston Stock Exchange* explicitly states that the decision should not be interpreted to invalidate state tax incentives encouraging intrastate economic development. *See* 429 U.S. at 336.

The key distinction between the tax strategies invalidated in *Boston Stock Exchange*, *Bacchus*, and *Westinghouse* and that employed by Ohio is the presence of burdens on out-of-state business and activities in the cited cases, and the absence of such burdens in this action. The Court of Appeals stated that Ohio's investment tax credit burdened interstate commerce by "coercing" companies to remain in Ohio. *See Cuno*, 386 F.3d at 746, note 1. However, the Court of Appeals did not—and could not—substantiate any burdensome effect because "coercion" cannot be found: the investment tax credit operates only prospectively. Indeed, Justice Stevens has written, "[n]or, in my judgment, does [the Commerce] Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring). The investment tax credit is a method that Ohio has adopted to promote economic development and to encourage investment and job creation in economically disadvantaged areas such as Toledo. It does not burden out-of-state business.

## III. Affirmance of the Decision of the Court of Appeals Will Interfere with the Ability of States to Enhance Their Economic Prospects, Promote Innovation, and Encourage Investment in Their Technology Sectors.

### A. Entrepreneurs and Emerging Businesses in the Technology Sector Will Suffer from the Instability in the Capital Markets that Will Ensue from Affirmance of the Decision Below.

Start-up and early-stage companies are engines of growth and provide great potential for local and regional economies. Nearly 70 percent of economic growth is attributed to such companies, and they are responsible for creating two-third of all new jobs.[11]

Although start-up and early-stage companies are critical for economic growth, they encounter substantial difficulty obtaining funding. Good business ideas often are unfulfilled because the entrepreneur cannot increase the initial $5,000 to $500,000.[12] Early funding usually comes from family and friends and is usually insufficient to keep the business running until additional sources can be identified and convinced to invest.

In contrast, the source of funding least available to start-up and early-stage companies is institutional venture capital. Institutional investors typically do not invest in such companies, generally because it is not financially feasible to

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[11] PHIL PSILOS, ET AL., A GOVERNOR'S GUIDE TO STRENGTHENING STATE ENTREPRENEURSHIP POLICY 4, 6 (2004), *available at* http://preview.nga.org/Files/pdf/0402GOVGUIDEENTREPRENEUR.pdf.

[12] John Torinus, *State needs daring measures to get new businesses up, running*, JOURNAL SENTINEL (Milwaukee), Sept. 20, 2003, at P03, *available at* http://www.jsonline.com/bym/news/sep03/171158.asp.

make investments of the size these companies require.[13] For example, the University of Wisconsin Foundation has more than $1 billion in assets under management but does not invest directly in companies.[14]

In 2003, the total institutional investment in entrepreneurial ventures totaled $18.2 billion, but only $304 million of that went to seed and start-up stage companies.[15] Fewer than one in every ten thousand start-up companies received its initial financing from venture capital firms.[16]

Angel investors play an important role in funding companies in phases between individual and institutional investment.[17] Angel investors, individuals having substantial personal assets and a desire to invest in local start-up businesses, are increasingly recognized as a critical component to a state's entrepreneurial community.[18] More than 300,000 angel investors were estimated to have invested approximately $30 billion in 2002 in over 50,000 deals, far outpacing the institutional venture capital market.[19]

For early-stage companies, location decisions are based on factors such as family considerations, access to faculty, facilities, and other resources of affiliated research

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[13] Tom Still, *Investment tax credit bill is a good start, but Wisconsin must confront other barriers to capital formation* (Apr. 21, 2004), *at* http://wistechnology.com/article.php?id=771.

[14] *Id.*

[15] Maria Minniti & William D. Bygrave, Global Entrepreneurship Monitor, National Entrepreneurship Assessment • United States of America, 2003 Executive Report 7 (2004), *available at* http://www.gemconsortium.org/download.asp?fid=355.

[16] William D. Bygrave & Stephen A. Hunt, GEM Financing Report 2004 20 (2005), *available at* http://www.gemconsortium.org/download.asp?fid=365.

[17] PSILOS, *supra* note 11, at 27.

[18] *Id.*

[19] *Id.*

institutions, suitable and affordable space, availability of skilled managers and workers, and eligibility for business assistance and economic development incentives. Even a cursory review of the weekly electronic newsletter of the National Association of Seed and Venture Funds[20] reveals that nowhere is the variety of economic development models and the importance of states' ability to experiment with different incentives to attract individual and institutional investment more evident than in the emerging technology sector.

The types of tax credits that are most beneficial to emerging technology companies are those that are refundable, those that can be carried forward to periods in which the company can reasonably expect to offset them against taxable income, or those that provide an indirect benefit by reducing the risk to potential investors and thus facilitating the ability to obtain funding. In that sense, such tax credits, as well as the Ohio investment tax credit, are the functional equivalents of subsidies. Even the Court of Appeals acknowledged that subsidies are consistent with the Commerce Clause. *Cuno*, 386 F.3d at 742.

An increasing number of states, including Maryland, offer tax credits to angel and institutional investors. *See, e.g.*, MD. CODE ANN., TAX-GEN. § 10-725 (LexisNexis Supp. 2005). Virginia, Maine, Vermont and West Virginia offer credits of up to 50 percent of investments subject to certain limitation. VA. CODE ANN. § 58.1-339.4 (2004 & Supp. 2005), ME. REV. STAT. ANN. tit. 10 § 1100-T (Supp. 2005), VT. STAT. ANN. tit. 32, § 5930k (Supp. 2005), W. VA. CODE § 11-13C-7a (2003). Hawaii offers to qualifying high-technology businesses a tax credit which can cumulate over five years to 100 percent of an investment. HAW. REV. STAT. ANN. § 235-110.9 (LexisNexis Supp. 2005).

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[20] NASVF NetNews, *at* http://www.nasvf.org/web/netnews.nsf.

Tax credits can confer benefits to emerging technology companies in addition to encouraging angel and institutional investment. Refundable investment and R&D tax credits such as those enacted by New York in 2005, may assist start-up and early-stage companies in obtaining bank loans. For example, Canadian banks are willing to lend to start-up companies using their refundable investment tax credit as collateral.[21] Such loans can be made for up to 75 percent of the federal refundable investment tax credit.[22]

State tax investment incentives are thus crucial in helping local start-up and early-stage businesses, and play an important role in creating future economic growth and new jobs. In addition, because start-up companies are important sources of new ideas and technologies, state tax investment incentives such as Ohio's investment tax credit promote innovation. This is critical for the future of not only Ohio but of the United States as a whole.

### B. Invalidating Ohio's Investment Tax Credit and Similar Statutes in Other States Will Not Level the Playing Field but Instead Will Siphon Investment to Countries that Offer Such Incentives.

Like Ohio's tax incentive, most state tax credit incentives restrict the tax credit to the in-state activities. Alabama, for example, provides an income tax credit for new investment in Alabama, ALA. CODE § 41-23-24(a) (2000); Arizona provides an income tax credit for taxpayers who increase in-state research activities, ARIZ. REV. STAT. ANN. § 43-1168 (Supp. 2005); Connecticut provides an income tax credit for investing in certain new manufacturing facilities in

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[21] Scotiabank - Investment Tax Credit Loan, *at* http://www.scotiabank.com/cda/content/0,1608,CID361_LIDen,00.html (last visited Nov. 29, 2005).

[22] *Id.*

Connecticut, CONN. GEN. STAT. ANN. § 12-217e (West 2000); Missouri provides an income tax credit for investing in small business in Missouri, MO. ANN. STAT. § 135.400-33 (West 2000 & Supp. 2005); and Maryland provides an income tax credit for investing in biotechnology companies, MD. CODE. ANN., TAX-GEN. § 10-725 (2005).

As already discussed, the decision of the Court of Appeals will result in the unintended consequence of impeding innovation among early-stage companies and impacting on entrepreneurship. Moreover, it will influence the location of facilities and operations by those technology companies that achieve profitability. Many nations and their political subdivisions already offer tax credits that are more attractive than the Ohio investment tax incentive struck down by the Court of Appeals. Such countries are already attracting American companies because of these incentives. This Court should consider the effects of restricting state tax credit incentives on the future competitiveness of the United States.

The United States now faces robust competitive challenges from China, Canada, India, Ireland, Taiwan, South Korea, Singapore, and other countries. These countries see their futures tied directly to becoming powerhouses in technology and innovation, primarily at the expense of the United States. Therefore, states must be permitted to develop programs with a keen awareness of the efforts being made by other countries to compete for technology, facilities, and jobs. The Council on Competitiveness examined foreign incentive packages as part of the National Innovation Initiative ("NII"). The NII called upon "[m]ore than 400 leaders and scholars from universities, corporations, professional societies, industry associations,

and government."[23] The NII's final report, "Innovate America," states that "America's [collective] challenge is to unleash its innovation capacity. . . . At a time when macro-economic forces and financial constraints make innovation-driven growth a more urgent imperative than ever before."[24] The NII outlined the "unprecedented acceleration of global change . . . fierce competition from countries that seek an innovation-driven future for themselves."[25] One of the necessary solutions the NII proposed is that the Government should increase the availability of early-stage risk capital with tax incentives, expanded angel networks, and state and private seed capital funds.[26]

The NII Report warned that "Sweden, Finland, Israel, Japan, and South Korea each spend more on R&D as a share of GDP than the United States."[27] "China overtook the United States in 2003 as the top global recipient of foreign direct investment."[28] "Only six of the world's 25 most competitive information technology companies are based in the United States; 14 are based in Asia."[29]

States wishing to enhance the economic welfare of their citizens must consider innovative incentive packages for technology companies and potential investors in light of incentives offered by foreign competitors. "The government of Canada is modifying the [Scientific Research & Engineering Development] credit mechanism to make it more attractive to foreign investors on an after-tax basis, taking account of the foreign investor's home country tax laws in

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[23] COUNCIL ON COMPETITIVENESS, INNOVATE AMERICA: NATIONAL INNOVATION INITIATIVE REPORT 13 (2004).
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.* at 35-36.
[27] *Id.* at 12.
[28] *Id.*
[29] *Id.*

order to increase investment in Canadian-based R&D, without reducing the government's net tax revenues."[30] This change, which is still draft legislation, should help a number of venture capital funded high-tech start-ups.[31]

South Korea's 2004 tax reform included several measures to boost corporate investment, including a reduction in the alternative minimum tax rate for small and medium-sized enterprises, and an extension and increase in the temporary investment tax credit for capital spending.[32]

Firms investing at least NT$25 million and increasing employment by at least 50 persons in underdeveloped Taiwanese regions are eligible for a tax credit equal to twenty percent of new investment.[33] Alternatively, they may choose not to pay corporate income tax for the specific year the investment is approved.[34]

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[30] David V. Daubaras, *Scientific Research & Experimental Development*, TAX EXECUTIVE, Nov. 1, 2004, at § 15, *available at* 2004 WLNR 16849433.

[31] Denis Lajoie, *Canada's Scientific Research and Experimental Development Program is in a State of Continuous Improvement with a Number of Recent Evolutions*, CA MAGAZINE, Aug. 1, 2005 *available at* 2005 WLNR 13911470.

[32] Economist Intelligence Unit, *Country Commerce South Korea 2004/2005 Main Report*, COUNTRY COMMERCE, July 30, 2004, *available at* 2004 WLNR 13972426.

[33] Economist Intelligence Unit, *Country Commerce Taiwan, Incentives: Regional Incentives*, COUNTRY COMMERCE, July 30, 2004, *available at* 2004 WLNR 15862193.

[34] Taiwan also offers specialized industrial parks in which, for example, companies may enjoy a five-year tax holiday, import-duty exemption, and a 20% ceiling on corporate income tax for investments in the manufacture of precision instruments, machinery and electronics. Also, a special 15% investment-tax credit, which may be deferred for up to four years, is available to companies undergoing capital expansion. More than 375 companies have commenced operations in one such park including 159 integrated-circuit manufacturers, 54 telecommunications firms, 60 opto-electronics firms, 57 computer and peripherals makers, 27 biotechnology companies, and 21 precision-machinery manufacturers. Fifty-seven are

As related to early-stage technology companies, state tax credit incentives to promote in-state R&D, investment and job creation in the technology sector are the opposite of "corporate welfare." These incentives do not discriminate against interstate commerce and are essential to promote innovation and enhance the long-term economic growth not only of each state but also the entire United States. Such incentives are at the very core of what the Commerce Clause was intended to create: an economic union of the states in which the success of each benefits all. *See Boston Stock Exch.*, 429 U.S. at 328. The decision of the Court of Appeals, which reached the opposite conclusion, is plainly wrong and should be reversed.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals holding that the Ohio investment tax credit, OHIO REV, CODE ANN. § 5733.33, violates the Commerce Clause should be reversed and the action dismissed.

Respectfully Submitted.

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Dated: December 5, 2005

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foreign companies including Royal Philips Electronics, Mitsubishi, Shin-Etsu Optoelectronics, Taisil Electronic Materials, Hewlett-Packard, Motorola, Logitech, and Siemens. Economist Intelligence Unit, *supra* note 33.

EXHIBIT

MD 069

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April 28, 2005

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

***Re: House Bill 664***

Dear Governor Ehrlich:

We have reviewed House Bill 664, "Biotechnology Investment Incentive Act," which was signed April 26th, for constitutionality and legal sufficiency. We write to discuss significant Commerce Clause issues raised by the bill.[1]

House Bill 664 provides a credit against State income tax for large investments made in qualified Maryland biotechnology companies. In order to qualify, a biotechnology company must have its headquarters and base of operations in Maryland. The tax credit allowed is 50% of the investment, up to $50,000 for an individual, $250,000 for a corporation, and $250,000 for a qualified Maryland venture capital firm. If the tax credit exceeds the total tax otherwise payable, the investor may claim a refund in the amount of the interest. Availability of the refund is dependent on the appropriation of money to the biotechnology investment tax credit reserve fund.[2] A system is set up whereby the Department of Business and Economic Development issues an initial tax credit certificate on a first come first served basis to investors intending to invest in a Maryland biotechnology company. Such certificates may be issued only to the extent that money is available in the reserve fund. Thus, investors know whether the credit will be available at the time that the investment is made.

[1] This letter confirms and explains oral advice given April 25, 2005.

[2] While the bill purports to require that the Governor make an appropriation to this fund, it does not specify an amount, or set a formula by which an amount can be determined. As a result, the Governor has the discretion not to make any appropriation for this purpose.

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The Commerce Clause of the United States Constitution provides that Congress has the power to "regulate Commerce ... among the several States." United States Constitution, Article I, § 8, clause 3. Although stated as a grant of power to Congress, the Clause has long been understood to prohibit state interference with interstate commerce. *H.P. Hood and Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). Such interference can arise from state taxation. A State tax will be upheld where it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). House Bill 664 raises issues under the third of these factors: discrimination against interstate commerce.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the Supreme Court examined the issue of whether a New York statute taxing securities transactions more heavily if they involved an out-of-state sale violated the Commerce Clause. The Court concluded that it did, stating that one of the "fundamental principles" of Commerce Clause jurisprudence is that a State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Id.* at 329. The Court found that the differential taxation meant that the choice of stock exchange by persons engaging in large transactions would not be made solely on the basis of nontax criteria. As a result, it acted to give the New York exchange a direct commercial advantage in violation of the Commerce Clause.

More recently, in *Fulton Corporation v. Faulkner*, 516 U.S. 325 (1996), the Court considered a North Carolina statute that imposed a tax on the value of corporate stock owned by State residents, with the amount of the tax varying depending on the exposure of the corporation to the State's income tax. The practical effect was that the tax was low or nonexistent on corporations in the State and significantly higher with respect to corporations that did little or no business in the State. The Court found that the tax facially discriminated against interstate commerce, in that it favored "domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce."

Cases from lower courts have reached similar conclusions. In *Smith v. New Hampshire Dept. of Revenue Admin.*, 692 A.2d 486 (N.H. 1997) *cert. denied* 538 U.S. 1025 (2003), the Court held that an exemption for interest and dividend income from investment in State financial institutions violated the Commerce Clause. Most recently, in *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004), the Sixth Circuit held that a tax credit for purchases of new manufacturing machinery and equipment if the new machinery or

equipment was installed in Ohio violated the Commerce Clause. This case is being appealed to the Supreme Court (Petition for Certiorari Filed Apr 18, 2005) but the Court has not made a decision whether to take the case.[3]

While none of the cases above are precisely analogous to House Bill 664, it is our view that that bill, which provides a direct commercial advantage to local business, and favors domestic business in raising capital, raises similar significant Commerce Clause issues. Therefore, we would recommend that alternate approaches be considered at a future legislative session.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
hb664.wpd

cc: Kenneth H. Masters
Secretary of State
Karl Aro

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[3] The *Cuno* case is the most far-reaching of these cases, in that it reaches tax credits available to out-of-state companies based on activities and job creation in the State, and the broad reach of the case has been questioned. *See* Gillis, *Sixth Circuit: Bans Ohio Tax Credit Under the Commerce Clause*, 101 J. Tax'n 359, 2004 WL 2801135 (December 2004). Whether this extension of the Supreme Court cases is correct, however, is not relevant to the issues raised by House Bill 664.

Supreme Court, U.S.
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Nos. 04-1704 and 04-1724

IN THE
# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
*Petitioners,*

v.

CHARLOTTE CUNO, ET AL.,
*Respondents.*

WILLIAM W. WILKINS, ET AL.,
*Petitioners,*

v.

CHARLOTTE CUNO, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF AMICUS CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS IN SUPPORT OF PETITIONERS

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December 5, 2005

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## QUESTIONS PRESENTED

Whether Ohio's Investment Tax Credit, Ohio Revised Code § 5733.33, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33.

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Nos. 04-1704 and 04-1724

IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,

*Petitioners,*

v.

CHARLOTTE CUNO, ET AL.,

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WILLIAM W. WILKINS, ET AL.,

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v.

CHARLOTTE CUNO, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

**BRIEF OF AMICUS CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS IN SUPPORT OF PETITIONERS**

## INTEREST OF AMICUS CURIAE[1]

The Ashbrook Center for Public Affairs ("Ashbrook Center") is an educational organization located at Ashland

[1] This brief is filed in accordance with the global consent letters filed by Petitioners and Respondents with this Court. Pursuant to Supreme Court Rule 37.6, the Ashbrook Center states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

University in Ashland, Ohio. For over twenty years the Ashbrook Center has provided a forum for the study, research, and discussion of the principles and practices of the American government. Consistent with this mission, the Ashbrook Center advocates the defense of individual liberty, limited constitutional government, and civic morality.

The Ashbrook Center recognizes the importance of Article III's standing requirement as an essential element of the separation of powers and a safeguard of democratic self-governance. The Ashbrook Center also recognizes that the principles of federalism embodied in the Constitution in general and in the Commerce Clause in particular permit the States to compete amongst themselves by lowering taxes to encourage investment. The Ashbrook Center has a strong interest in preserving the principles embodied in the Constitution, including those in the Commerce Clause.

## SUMMARY OF THE ARGUMENT

Respondents do not have standing to challenge Ohio's investment tax credit ("ITC"), Ohio Rev. Code § 5733.33. Most of the Respondents assert claims based only upon their status as citizens and taxpayers. Such generalized grievances, which are shared by a large class of citizens, are insufficient to establish federal jurisdiction.

The complaint asserts varying claims brought by three groups of plaintiffs: (1) Ohio citizens/taxpayers, who allege that the operation of Ohio's ITC decreases state revenues and imposes a disproportionate tax burden on them; (2) Michigan citizens/taxpayers, who claim that they were denied various "economic opportunities" when DaimlerChrysler Corporation located its plant in Ohio, rather than Michigan; and (3) residents of Toledo who allege that they were

displaced by the development of DaimlerChrysler's Toledo plant.

None of these three groups meet the minimum standing requirements of injury in fact, causation, and redressability. Respondents' allegations regarding state revenues and relative tax burdens are indefinite, generalized grievances that do not warrant federal jurisdiction. Nor could the alleged harms to the Michigan Plaintiffs or the displaced Toledo residents even be redressed by a favorable decision from this Court. An injunction entered against the operation of Ohio Rev. Code § 5733.33 would not result in relocation of DaimlerChrysler's Jeep plant from Ohio to Michigan, and would not return properties to the individuals alleging "displacement." Because no Respondent has standing to challenge the tax credit, the Sixth Circuit's decision should be vacated.

If this Court reaches the merits of Respondents' claims, it should reverse the judgment of the circuit court. The "dormant" or "negative" aspect of the Commerce Clause is fundamentally aimed at prohibiting protectionist measures that benefit in-state interests by discriminating against or imposing undue burdens on interstate commerce. The Commerce Clause does not, however, prevent states from competing for a share of interstate commerce. To the contrary, this Court has repeatedly emphasized that such competition -- including efforts to attract businesses through low taxes -- is a central element of our nation's free-trade policy.

Ohio's ITC is consistent with the principles enunciated by the Court. The tax credit is not a protectionist measure. It is equally available to in-state and out-of-state businesses; imposes no burden on taxpayers who choose to invest elsewhere; and does not discriminate against interstate commerce.

The Sixth Circuit's holding that such a credit violates the Commerce Clause is a significant departure from this Court's case law. This Court has emphasized that the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but *only* those regulations that burden interstate commerce. In finding Ohio's ITC unconstitutional, the Sixth Circuit simply failed to distinguish between laws that discriminate against interstate commerce and those, like Ohio's tax credit, that are part of the State's permissible efforts to encourage intrastate development.

## ARGUMENT

### I. Respondents Do Not Have Standing to Challenge Ohio's Investment Tax Credit.

As an initial matter, Respondents have not alleged a sufficient injury to confer standing under Article III. Although the parties did not press the issue before this Court, the Court correctly directed the parties to brief the question of standing because it is apparent that Respondents have failed to allege a cognizable injury in fact. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990) ("Although neither side raises the issue [of standing] here, we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.") (citation omitted).

Respondents' response to the petitions for certiorari makes clear that they assert their claims based upon their status as citizens and taxpayers. Respondents complain of the "impacts [of the tax credit] on state and local revenues and on the distribution of costs of government among different classes of taxpayers." Resp'ts Br. in Resp. to Pet. for Cert. at 6, Case Nos. 04-1704, 04-1724. The harms that

they seek to remedy are the purported "shift of the costs of state and local government to other classes of taxpayers" and a "reduction in states' and localities' ability to deliver important public services." *Id.* Respondents' goal is to "free all the states from the necessity of engaging in an escalating competition over incentives that deprives them of needed revenues." *Id.* at 5-6.

Such "injuries" do not confer standing. In order to satisfy the case or controversy requirement under Article III, a plaintiff must demonstrate: (1) that he or she has suffered an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) that the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff must establish that he has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99 (internal quotations omitted). Not any allegation of injury will suffice -- the injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

Respondents' reliance on an alleged "shift" of tax burdens and the purported "reduction in states' and localities' ability to deliver important public services" belies their lack of standing to challenge Ohio's ITC. In truth, they have simply failed to allege a concrete and particularized injury as required by this Court. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. There is, of course, no general "taxpayer standing" that would allow Respondents to pursue this action. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (to have standing, a taxpayer must show that "his tax

money is being extracted and spent in violation of specific constitutional protections" imposed against the power to tax and spend); *Warth*, 422 U.S. at 509 (rejecting asserted taxpayer standing as an "ingenious academic exercise" where the "injury" of increased taxation was indirect and "conjectural").

It is well established that a plaintiff must be able to show that he has sustained or is in immediate danger of sustaining a direct injury, "and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). This Court has repeatedly held that where the asserted harm is a generalized grievance shared by all or a large class of citizens, that harm alone normally does not warrant the exercise of jurisdiction. *Warth*, 422 U.S. at 499; *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public"); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) ("it is not sufficient that [the plaintiff] has merely a general interest common to all members of the public").

An alleged injury that is shared in common by members of the public is necessarily abstract and lacks the essential dimension of specificity to the dispute that this Court requires. *See Schlesinger*, 418 U.S. at 220-21. In fact, this Court has unambiguously rejected jurisdiction in such circumstances:

> Only concrete injury presents the factual context within which a court ... is capable of making decisions.... To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role

> of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

*Id.* at 221-22.

Like Respondents' filings in this Court, the underlying complaint alleges abstract and speculative injuries based primarily upon the Respondents' status as citizens and taxpayers. The complaint asserts varying claims brought by three groups of plaintiffs: Ohio citizens/taxpayers, Michigan citizens/taxpayers, and residents of Toledo who allege that they were displaced by the development of DaimlerChrysler's Toledo plant. For reasons set forth below, none of these three groups meet the "irreducible minimum" constitutional requirements of injury in fact, causation, and redressability. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

According to the complaint, most of the Respondents are residents of the City of Toledo (or corporations doing business in Toledo) who "pay property, sales and/or income taxes to the City of Toledo, Lucas County, and State of Ohio." Compl. ¶¶ 2, 4, 5, *Cuno v. DaimlerChrysler, Inc.*, Court of Common Pleas, Lucas County, Case No. CI0200002084, filed March 28, 2000. These Respondents, referenced in the complaint as the "Ohio Plaintiffs," challenge the ITC on the theory that its operation decreases state revenues and imposes a disproportionate tax burden on them. *See id.* ¶¶ 40, 47. They allege that the application of Ohio's ITC "depletes the funds of the State of Ohio ... thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs." *Id.* ¶ 40.

Both this Court and the Sixth Circuit have made clear that an allegedly increased tax burden does not provide

standing for taxpayers to challenge the application of state tax provisions to third parties.[2] *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (finding that taxpayers do not have a sufficient stake in a controversy to support standing "where their own injury is not distinct from that suffered in general by other taxpayers or citizens"); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999) ("[U]nder settled law, the alleged 'tax burden' injury is not an injury in fact sufficient to confer standing.").

The Ohio Plaintiffs simply have not alleged a direct injury that is distinct from that shared by a large group of Ohio taxpayers. Rather, the purported injury is "merely derivative, and therefore insufficient to establish an injury in fact." *Coyne*, 183 F.3d at 495. Such generalized grievances do not warrant the exercise of federal jurisdiction. *See Warth*, 422 U.S. at 499; *Schlesinger*, 418 U.S. at 220-21; *Ex parte Levitt*, 302 U.S. at 634; *Frothingham*, 262 U.S. at 488;

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[2] It is worth pointing out, moreover, that the Ohio Plaintiffs have also failed to show causation between the tax credit and the alleged harm. Respondents assume that the operation of Ohio's ITC will "deplete[] the funds of the State of Ohio." Compl. ¶ 40. However, as other *amici* have explained, the tax credit can lead to *greater* tax revenues for the State, both (1) from the increased taxes on the new income earned by individuals who are newly-employed because of the new investment, and (2) through increased sales, payroll, property and income taxes on the additional business activities generated through new investment. *See* Br. of *Amici Curiae* Ford Motor Co. & General Motors Corp. in Support of Cert. at 4, Case No. 04-1704; Br. of *Amicus Curiae* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW in Support of Cert. at 5, Case No. 04-1704 ("an incentive package paid to encourage an automaker to invest in a community is quickly recovered through tax revenues generated by jobs created, along with additional indirect or spinoff employment effects") (citation omitted). Respondents' assumptions notwithstanding, the alleged effect of Ohio's ITC on their tax burden is uncertain, "conjectural," and "hypothetical," rather than "concrete" and "actual" as this Court requires. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103.

*see also* 13 C. Wright, A. Miller, & E. Cooper, Fed. Prac. & Proc. § 3531.10 (2d ed. 1988) ("Any general argument that the plaintiff is injured because his own tax liability is increased by favorable treatment extended to another taxpayer seems doomed to fail.").

Other plaintiffs, who are Michigan taxpayers, allege that but for Ohio's tax credit DaimlerChrysler would have made additional investments in Michigan. *See* Compl. ¶ 42. These individuals, referenced in the complaint as the "Michigan Plaintiffs," do not even come close to meeting the requirements for standing. The Michigan Plaintiffs claim that they are injured by the Ohio tax credit because the credit "induced DaimlerChrysler to continue to operate its plants in Toledo" rather than moving those operations to Michigan.[3] *Id.* They broadly assert that if the plant had been located in Michigan, it would have provided "economic opportunities, in the form of jobs and/or certain tax revenues ... from which the Michigan Plaintiffs would have benefited." *Id.* These allegations fail for several reasons.

First, like the Ohio Plaintiffs, the Michigan Plaintiffs have not alleged a direct injury, but rather generalized grievances (*i.e.*, the lack of new jobs and higher tax revenues) that are shared by Michigan taxpayers and citizens generally. As discussed above, such generalized grievances do not warrant the exercise of federal jurisdiction. *See ASARCO*, 490 U.S. at 613; *Warth*, 422 U.S. at 499; *Schlesinger*, 418 U.S. at 220-21; *Ex parte Levitt*, 302 U.S. at 634; *Frothingham*, 262 U.S. at 488. Nor do their allegations

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[3] Of course, this allegation is directly at odds with Respondents' own argument to this Court that "the actual influence of state and local tax incentives on business location decisions are, at most, marginal" and "there is no evidence that investment tax credits like Ohio's are significant factors in business location decisions." Resp'ts Br. in Resp. to Pet. for Cert. at 7, Case Nos. 04-1704, 04-1724.

suggest an injury that is "concrete and particularized" and "actual or imminent," rather than "conjectural" or "hypothetical." *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. Quite the contrary, the broad suggestion that there may have been additional employment opportunities somewhere in Michigan says *nothing* about these particular plaintiffs. These allegations fall far short of this Court's requirement that a plaintiff "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge*, 454 U.S. at 472.

The Michigan Plaintiffs also fail to meet the requirement of redressability. *See Lujan*, 504 U.S. at 561 (to establish standing, "it must be likely ... that the injury will be redressed by a favorable decision") (internal quotations omitted); *Valley Forge*, 454 U.S. at 472 ("Art. III requires ... that the injury ... is likely to be redressed by a favorable decision.") (internal quotations omitted); *see also Coyne*, 183 F.3d at 495 ("Not only must a plaintiff's injury be direct, a plaintiff must show that a favorable court decision will redress the injury."). Respondents have not even suggested that an injunction entered against the operation of Ohio Rev. Code § 5733.33 would result in relocation of the Jeep plant from Ohio to Michigan. Of course, any such contention would be spurious, as the improvements to the Toledo facility were substantially implemented by the filing date of the complaint. Because the requested relief cannot remedy the asserted injuries to the Michigan Plaintiffs, those plaintiffs have no standing. *See Lujan*, 504 U.S. at 561; *Valley Forge*, 454 U.S. at 472.

The remaining Respondents include Toledo residents and a business that were allegedly displaced from the development area as the result of the use or threatened use of Toledo's eminent domain authority. *See* Compl. ¶¶ 2, 6. This group of plaintiffs also fails the requirement of redressability. The complaint lacks any allegation that the

requested injunction against the operation of the tax credit would undo these plaintiffs' injuries. Indeed, these plaintiffs can make no such claim because each has surrendered his or her property and the area has been substantially developed. They therefore lack standing as well. *See Lujan*, 504 U.S. at 561; *Valley Forge*, 454 U.S. at 472.

Importantly, the only plaintiff that arguably had a claim to standing at any point in this litigation (albeit one that was insufficient), Kim's Auto and Truck Service, Inc., surrendered possession of its property in August 2004 and thus lost whatever claim to standing it may have had.[4] A loss of standing, even during an appeal, undisputedly moots a plaintiff's claims. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (internal quotations omitted); *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (same).

Since Kim's Auto's claim became moot during the appeals process, any judgment that necessarily relied on

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[4] Although Kim's Auto sought an injunction against the operation of the ITC in order to prevent its displacement from the development area, the other Respondents asserting displacement actually surrendered their properties before the filing of this suit. *See* Compl. ¶ 2. *Amicus* does not concede, moreover, that Kim's Auto ever had standing during the course of this litigation. In addition to the redressability problem discussed above, Kim's Auto can show only indirect causation between the tax credit and the asserted injury. The immediate cause of the injury is the government's use of eminent domain. However, Respondents' theory of this case appears to be that Kim's Auto was harmed because the tax credit caused new investment, which led to development, which ultimately necessitated the use of eminent domain, which caused the injury. Although Kim's Auto may have properly challenged the use of eminent domain, any tangible effect of the *tax credit* was, at most, "remote, fluctuating, and uncertain." *Valley Forge*, 454 U.S. at 477 (quoting *Frothingham*, 262 U.S. at 487).

Kim's Auto's standing must be vacated and the case remanded with instructions to dismiss. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see also McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) ("if a case becomes moot during an appeal, the judgment below must be vacated and the case remanded with instructions to dismiss").

## II. Ohio's Investment Tax Credit Does Not Violate the Commerce Clause.

Notwithstanding these jurisdictional defects, *if* this Court reaches the merits of Respondents' claims it should reverse the judgment of the circuit court. The challenged tax credit, Ohio Rev. Code § 5733.33, is consistent with the purposes of the Commerce Clause. The ITC encourages economic growth and the free flow of goods among states. It does not discriminate between in-state and out-of-state taxpayers, and it establishes no requirements that disturb the flow of commerce across Ohio's borders.

The Sixth Circuit's holding that such a credit violates the Commerce Clause represents a significant departure from this Court's case law. The Sixth Circuit's decision disregards fundamental principles enunciated by this Court, misapplies relevant precedent, and runs counter to the settled understanding that the Commerce Clause's anti-discrimination principle is intended to invalidate *protectionist* state laws, but not the competitive use of tax policy to encourage intrastate investment.

### A. Ohio's Investment Tax Credit Is Consistent With the Principles Enunciated by this Court.

Ohio's ITC provides that a taxpayer may receive a "nonrefundable credit ... against the tax imposed by section 5733.06 of the Revised Code" (Ohio's corporate franchise tax) if the taxpayer "purchases new manufacturing

machinery and equipment" and installs the equipment in Ohio during a qualifying period. Ohio Rev. Code § 5733.33(B)(1). A tax credit is available in an amount equal to 7½ percent of "the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county" over and above the average annual cost of new manufacturing machinery and equipment purchased by the taxpayer for use in that county during three specified prior years. The credit amount increases to 13½ percent if the otherwise qualifying investment is made in an "eligible area" that suffers from specified levels of unemployment or poverty, or has experienced significant closings or downsizing by local employers. *See* Ohio Rev. Code §§ 5733.33(C)(1)-(2), (A)(8)-(16). The ITC therefore serves the dual goals of boosting economic development in Ohio and encouraging job creation in the areas that need it most.

As the panel below recognized, "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743 (6th Cir. 2004). Such incentives fit well within this Court's Commerce Clause jurisprudence. The Commerce Clause empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The "dormant" or "negative" aspect of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

It is settled that the Commerce Clause prevents states from discriminating against out-of-state or interstate businesses, thus avoiding "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (internal quotations omitted). This

does not, of course, mean that states are not free to compete for interstate commerce. Quite the contrary, this Court has emphasized that "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

This Court has long-recognized that the Dormant Commerce Clause is fundamentally aimed at prohibiting states from engaging in economic protectionism. "This 'negative' aspect of the Commerce Clause prohibits *economic protectionism* -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988) (emphasis added); *see also Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 63 (2005) (noting that the Dormant Commerce Clause "weighs basic principles of federalism against local economic protectionism").[5]

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[5] This Court set out the classic explanation of the Commerce Clause's anti-discrimination principle in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935):

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.... Neither the power to tax nor the police power may be used by the state of destination *with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.* Restrictions so contrived are an unreasonable clog upon the mobility of commerce. *They set up what is equivalent to a rampart of customs duties* designed to neutralize advantages belonging to the place of origin.

*Id.* at 527 (emphasis added); *see also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-33 (1949).

Consistent with this view, this Court has explained that the "fundamental command of the Clause" is that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The *central rationale* for the rule against discrimination *is to prohibit state or municipal laws whose object is local economic protectionism* ....") (emphasis added). In light of this fundamental command, this Court has noted that the "paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

Nothing in the Commerce Clause prevents states from competing for intrastate investment, so long as they do not do so in a way that imposes a protectionist regime or penalizes those who engage in interstate trade. "The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy*, 486 U.S. at 278 (emphasis added). Hence, even while invalidating protectionist state laws, this Court has emphasized that its decisions do not prevent the states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). Indeed, the Court has explicitly rejected the notion that states may not compete for interstate commerce, finding that such competition "lies at the heart of a free trade policy," *id.* at 336-37, and that a state may enact laws "that have the purpose and effect of encouraging domestic industry,"

*Bacchus Imports*, 468 U.S. at 271. *See also Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991) ("It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State.").

Consistent with the framework set out above, it is clear that a state may use low tax rates to attract new investment. *See, e.g., West Lynn Creamery*, 512 U.S. at 199 n.15 (noting that it is "undisputed" that States may attract business through "low taxes"). This Court has even found that direct state subsidies provided to in-state companies impose no burden on interstate commerce, but merely assist local businesses. *See id.*; *New Energy*, 486 U.S. at 278 ("[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition"). Several Justices have noted that tax incentives are equally permissible. *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("There seems to be nothing ... that would prevent [a State] from providing subsidies or other tax breaks to domestic industries ....").

Ohio's ITC is designed in precisely the manner contemplated by this Court in *Boston Stock Exchange* and the other cases discussed above. Its purpose is to encourage intrastate investment and promote local economic growth. The ITC is not a protectionist measure. It is equally available to in-state and out-of-state businesses and imposes no "burden" other than the lost opportunity of foregone benefits for those taxpayers who choose to invest elsewhere. The investment tax credit is certainly not akin to a tariff, since it "does not burden in the slightest the transfer of goods

in interstate commerce." *Cuno v. DaimlerChrysler, Inc.*, 154 F.Supp.2d 1196, 1203 (N.D. Ohio 2001). The district court correctly found that the tax credit at issue here does not discriminate against interstate commerce and that to hold otherwise would "violate the clear mandate" of this Court. *See id.*

### B. The Sixth Circuit Erred in Finding Ohio's Investment Tax Credit Unconstitutional.

In the decision below, the Sixth Circuit held that Ohio's ITC is unconstitutional because it impermissibly discriminates against interstate commerce. In doing so, the court accepted Respondents' argument that the credit is invalid because its effect "is to encourage further investment in-state at the expense of development in other states" and that this allegedly "hinder[s] free trade among the states." *See* 386 F.3d at 745. In reaching this conclusion, the Sixth Circuit rejected Petitioners' argument that the Dormant Commerce Clause is primarily concerned with preventing economic protectionism. *Id.* Instead, the court suggested that no meaningful distinction exists "between laws that benefit in-state activity and laws that burden out-of-state activity" because, "economically speaking, the effect of a tax benefit or burden is the same." *Id.*

The Sixth Circuit's decision finds no support in any of the cases upon which the court relies. Ohio's ITC does not impose a burden on taxpayers who forego the tax credit and invest elsewhere. A taxpayer, whether in-state or out-of-state, either takes advantage of the ITC or it does not. By contrast, each of the cases relied upon by the Sixth Circuit -- *Boston Stock Exchange, Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) -- involves protectionist measures that imposed direct burdens on taxpayers engaging in out-of-state activity.

*Boston Stock Exchange* involved a New York statute that imposed a lower transfer tax on securities transactions

completed through New York brokers than on identical transactions using out-of-state brokers. *See* 429 U.S. at 324-25. The higher tax on out-of-state sales constituted a "discriminatory burden on commerce" and was struck down because "no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 331, 337.

Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), this Court struck down a severance tax imposed on natural gas which, through the operation of numerous exemptions and credits offered for local uses, was actually borne only by out-of-state consumers. *See id.* at 756-57 (concluding that the Louisiana tax scheme "unquestionably discriminates against interstate commerce" because "users in other States are burdened with the Tax" while Louisiana consumers are "substantially protected against the impact" of the tax). Likewise, in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), the Court invalidated a tax credit given to corporations based on the portion of their exports shipped from New York. The tax scheme in that case penalized increases in corporations' export activities in other states, and thus imposed an impermissible burden on commerce. *See id.* at 400-01, 406.

In each of these cases, a state's taxing scheme imposed a direct burden on taxpayers who chose to engage in out-of-state activities. The Sixth Circuit recognized the proper legal rule: the Commerce Clause does not "prevent a state from 'compet[ing] with other States for a share of interstate commerce' so long as 'no State [] discriminatorily tax[es] the products manufactured or the business operations performed in any other State.'" *Cuno*, 386 F.3d at 742-43 (quoting *Boston Stock Exch.*, 429 U.S. at 336-37). The court simply failed to correctly apply that rule to the facts of this case.

In contrast to the cases relied upon by the Sixth Circuit, Ohio's ITC does not impose a direct burden on anyone -- it

merely does not provide a benefit to those taxpayers who disregard Ohio's location incentive. It establishes no requirements that disturb the free flow of commerce across Ohio's borders. To the contrary, the ITC actually encourages out-of-state companies to operate across state lines. Unlike the tax credit in *Westinghouse*, which penalized out-of-state activity by decreasing the amount of the credit, Ohio's ITC is available regardless of the extent of the taxpayer's overall presence in the state and the amount is *not* reduced as the taxpayer increases its investment in other states. *Compare Cuno*, 154 F.Supp.2d at 1203, *with Westinghouse Elec. Corp.*, 466 U.S. at 400-01.

The Sixth Circuit sidestepped all of these factors by rejecting the settled view of the Dormant Commerce Clause and denying the legal distinction between permissible efforts to benefit in-state activity and unconstitutional burdens on out-of-state activity:

> The defendants maintain ... that tax incentives, like the Ohio tax credit, are permissible as long as they do not penalize out-of-state economic activity .... In their view, the Commerce Clause is primarily concerned with preventing economic protectionism -- that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce.... [I]t is clear that the [Supreme] Court itself has not adopted this approach in analyzing dormant Commerce Clause cases, undoubtedly because it rests on the distinction between laws that benefit in-state activity and laws that burden out-of-state activity. Such a distinction is tenuous ....

*Cuno*, 386 F.3d at 745.

The Sixth Circuit's conclusions are erroneous and ignore a wealth of authority issued by this Court. As described in detail above, the "view" that the Commerce Clause is primarily concerned with protectionism is not, as the court postulates, merely Petitioners' "theory." *See id.* This Court has repeatedly explained that the "negative" aspect of the Commerce Clause is aimed at prohibiting protectionism. *See, e.g., Fulton Corp.*, 516 U.S. at 330; *New Energy*, 486 U.S. at 273-74. Indeed, that is the *central rationale* for the anti-discrimination principle and the *fundamental command* of the Commerce Clause. *See C & A Carbone*, 511 U.S. at 390; *Assoc. Indust. of Mo.*, 511 U.S. at 647; *Armco Inc.*, 467 U.S. at 642. The Sixth Circuit's assertion that this Court has not adopted Petitioners' approach is simply incorrect.

The Sixth Circuit's failure to distinguish between laws that benefit in-state activity and laws that burden out-of-state activity is a fatal flaw. This Court has repeatedly drawn precisely that distinction. While the Court has invalidated laws (such as the tax scheme penalizing out-of-state stock sales in *Boston Stock Exchange*) that impose a direct burden on taxpayers, the Court has been careful to remind us that nothing prevents the states from structuring their tax systems to encourage intrastate development. *See, e.g., Boston Stock Exch.*, 429 U.S. at 336. Certainly the Court made this point clear in *New Energy*, where it emphasized that the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only those regulations that burden interstate commerce. *See* 486 U.S. at 278. Simply put, the circuit court erred in failing to distinguish laws that impermissibly burden commerce from those, like Ohio's ITC, that do not.

## III. Conclusion.

The importance of this case cannot be overstated. Every state provides tax and other economic incentives as an

inducement to local industrial location and expansion. *See* Timothy Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. Tax'n 359, 359 (2004); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996). The Sixth Circuit's ruling casts hundreds of these programs under a cloud of uncertainty. If that court's erroneous interpretation of the Commerce Clause is allowed to stand, the States will lose one of their key tools for competing in the world market. Indeed, even during the course of this litigation some of Ohio's largest employers have lamented that the Sixth Circuit's holding "seriously impede[s] investment decisions to locate new business operations within the various States" and the result "is unavoidably harmful to the growth and development of our Nation's commerce as a whole." Br. of *Amici Curiae* Ford Motor Co. & General Motors Corp. in Support of Cert. at 13-14, Case No. 04-1704.

The Sixth Circuit's decision results from myriad errors. The court overlooked basic jurisdictional defects and struck down Ohio's investment tax credit even though Respondents lack standing to challenge that provision. In reaching its decision on the merits, the panel rejected this Court's repeated instruction that the Commerce Clause is fundamentally aimed at prohibiting protectionist measures that burden interstate commerce, but *not* any and all attempts to compete with other States for investments. The Sixth Circuit's holding disregards fundamental principles enunciated by this Court and runs counter to the Court's settled understanding and application of the Commerce Clause.

For these reasons, the Ashbrook Center respectfully requests that this Court vacate, or in the alternative reverse, the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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DAIMLERCHRYSLER CORPORATION, ET AL.,

*Petitioners,*

v.

CHARLOTTE CUNO, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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**BRIEF OF CENTER ON BUDGET AND POLICY PRIORITIES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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This brief is filed on behalf of the Center on Budget and Policy Priorities as *amicus curiae* in support of the respondents, with the written consent of the parties lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

## INTEREST OF *AMICUS CURIAE*

Founded in 1981, the Center on Budget and Policy Priorities is a District of Columbia non-profit policy institute that conducts research and analysis to inform public debates over state and federal budget and tax policies and to help ensure that the needs of low and moderate-income families and individuals are considered in those debates. The Center is concerned that limited state and local tax revenues that finance public services needed by low-income families and individuals are being given away in the form of often ineffective and unconstitutional tax incentives like the one at issue in this case. Further, state and local tax systems already are largely structured in a manner that imposes disproportionate tax burdens on those at the low end of the income distribution; the Center is concerned that the revenue loss associated with tax incentives such as the one at issue in this case leads to still higher tax burdens for low and moderate-income people as states seek to replace the lost revenue.

## SUMMARY OF THE ARGUMENT

The Commerce Clause is necessary for a national economy in which there is a free flow of goods, services and capital among the states. Ohio's Investment Tax Credit discriminates against interstate commerce in that it can result in lower taxes for Ohio firms that invest in new facilities in-state, as opposed to similarly situated Ohio firms that chose to invest in new out-of-state facilities. The system of competing state investment incentives has adverse political and economic effects that violate the letter, spirit and intent of the Commerce Clause. The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

## ARGUMENT

### TO ACHIEVE THE PURPOSES OF THE COMMERCE CLAUSE, IT MUST ENCOMPASS THE INTERSTATE FLOW OF INVESTMENT AS WELL AS THE INTERSTATE FLOW OF GOODS AND SERVICES

One of the important reasons for the Constitution was the need to develop a national economy. Under the Articles of Confederation the states were free to impose tariffs and other restraints on interstate commerce. Economic growth stagnated. Commercial rivalry among the states even raised fears of "serious interruptions of public tranquillity."[1] When the states adopted the Constitution, they gave up their power

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[1] The Federalist No. 42, at 264 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961).

to promote their own economic good at the expense of the nation.[2] In the often quoted words of Justice Jackson,

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

*H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

While the temptation to give local enterprise an edge has never disappeared, when states have attempted to favor

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[2] "Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills." *Quill Corp. v. North* Dakota, 504 U.S. 298, 312 (1992) (citing The Federalist Nos. 7 & 11 (Alexander Hamilton)). It is worth noting that the European Union has to deal with the same issues: see Reuven S. Avi-Yonah, *Passport to Toledo: Cuno, the World Trade Organization, and the European Court of Justice*, 109 Tax Notes 1661 (Dec. 26, 2005); and Lee A. Sheppard, *Self-Inflincted Wounds: What Europe Can Teach the States*, 104 Tax Notes 349 (July 26, 2004).

in-state over out-of-state business, this Court has struck down those schemes as inconsistent with the concept of an open national market.

A national economy encompasses not just the free flow of goods, labor, and services; it must also include the free flow of investment capital. Devices to attract investment capital have an almost irresistible appeal to political leaders at every level. The desire to take credit for new jobs has resulted in the quest for ways to favor local development. The device at issue in this case is an Ohio investment tax credit (ITC) granted to the Petitioner, DaimlerChrysler Corporation. Ohio Rev. Code Ann. § 5733.33. Respondents contend that this tax credit violates the Commerce Clause of the Constitution, Art. I, § 8. The Ohio Petitioners point out that this Court has never struck down an investment incentive analogous to the Ohio tax credit. They claim Ohio's

> tax credit is freely available to all who invest in Ohio, whether already here or new to the State. And unlike a tariff, it does not seek to impose an ongoing burden on those who elect to place their facilities elsewhere. Rather it merely provides a one-time benefit, akin to a subsidy, to those who locate their facility in the State. That is, as its name suggests, it provides *incentives*, not *penalties* . . . .

Ohio Petrs.' Br. 3.

They contend that this Court has invoked the Commerce Clause only against "protectionist tariffs and tax regimes calibrated to the same protectionist ends."

(DaimlerChrysler Petr.'s Br. 26). Therefore, they contend that this case falls outside all of the cases in which this Court has found a violation of the Commerce Clause.

The intent of the Commerce Clause is not so limited.[3] Tariffs and protectionist taxes are wrong not only because of narrow economic considerations, but because they offend the fundamental concept of a national economy. In addition to discriminating against interstate commerce, they result in destructive and wasteful rivalry among the states, they squander valuable resources, create unwarranted windfalls for private interests, interfere with effective policies for economic growth, misallocate investment, distort the tax and budget decisions of the states, and interfere with the normal comity and civility among the states.[4] It is against the standard of a true national economy, in both an economic and political sense, that the tax incentive in question here must be judged.

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[3] *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp. v.* Tully, 466 U.S. 388 (1984); and *Maryland v. Louisiana*, 451 U.S. 725 (1981).

[4] Complaints against the economic conditions under the Articles of Confederation included, "the decay of our trade and manufactures–the scarcity of money–the failure of publick credit–the distraction of our publick affairs, and the distress of individuals." *A Political Dialogue*, Massachusetts Centinel (Boston), Oct. 24, 1787, *in The Debate on the Constitution Part One* 189, 190 (Bernard Bailyn ed., Library of America 1993).

## THE OHIO INVESTMENT TAX CREDIT VIOLATES THE COMMERCE CLAUSE

Petitioners devote much of their argument to the claim that there are no cases holding that an investment incentive analogous to the Ohio ITC violates the Commerce Clause. The lack of case law on this specific point is hardly a reflection on the state of the law or the merits of this case. It is rather a reflection of economic reality. Courts cannot decide cases when no one brings them. Those in the best position to challenge tax schemes that violate the Commerce Clause are the ones who benefit most from such schemes. A firm believing itself disadvantaged by a tax scheme may well feel better advised to seek the same advantage for itself than challenge the system. As discussed below, the corporate world, in general, has benefited greatly from the competition among the states to grant investment incentives. Likewise, state political leaders may well prefer press releases announcing the creation of "new jobs" to the vindication of the values embodied in the Commerce Clause. Given the incentives, the costs, and procedural obstacles, the real wonder is that there are any Commerce Clause cases at all.

Petitioners contend that an ITC is simply a subsidy, and cite authority for the proposition that a subsidy, even one limited to in-state investment, cannot violate the Commerce Clause. Equating an ITC to a subsidy defies reality and common sense. There is a reason that those seeking or granting investment incentives regularly look to the tax codes and rarely to direct subsidies. Subsidies invoke the political process in a far more direct and specific way. A subsidy must be appropriated by a legislature; it must name an amount and define recipients. The conscious appropriation of the public's money inevitably faces

difficulties and challenges that abstract and arcane changes to a tax code do not. Does DaimlerChrysler ask us to believe that invoking Ohio's ITC was *exactly* the same as going to the Ohio state legislature and asking for a direct subsidy in the amount involved here? Are we to believe that the resulting debate would not have mattered?

However it may be characterized, the Ohio ITC does discriminate against interstate commerce. This can be easily demonstrated using a simple and realistic hypothetical example. (The details are set out in Appendix A.) Assume that two equally situated Ohio firms decide to expand. One firm constructs a new plant in Ohio; the other firm constructs an identical new plant in another state. If the first firm's new plant in Ohio generates enough ITC to eliminate the taxes owed by the preexisting plant, then that firm will owe nothing in Ohio taxes. On the other hand, the firm which expands outside Ohio will continue to owe Ohio taxes on income attributable to its preexisting plant in Ohio and will therefore be at a disadvantage–even if the other state has a tax regime identical to that of Ohio, including an ITC. Thus, Ohio's investment tax credit discriminates against the company that chooses to expand outside the state by imposing a higher income tax burden upon it.

## EVEN THOUGH STATE INVESTMENT TAX INCENTIVES ARE RARELY EFFECTIVE, THEY DAMAGE THE NATIONAL ECONOMY

An effort to assess the effect of investment tax incentives on the commerce among the states must take into account four somewhat overlapping features of state investment promotion.

First, it is beyond dispute that the incentives are intended to be effective. Each state intends to promote investment at home and not somewhere else. No state's or locality's incentive is aimed at benefiting the nation's economy as a whole.

Second, such efforts can only be effective on the margin. State and local taxes are only one of a myriad of factors that influence a firm's location decision. Savings from tax incentives are quite small compared to such costs as labor and transportation. Evidence from IRS data suggests that state and local taxes amount to less than 2 percent of total costs for an average corporation.[5] Also limiting the effectiveness of any location incentive is the very pervasiveness of such schemes. If only one state, or very few, were to offer such incentives, the chances of success would be greater than if many or all offered them. As detailed in the Amicus Brief of the Washington Legal Foundation, virtually every state offers some version of an investment incentive.[6] One must also take into account, not only the pervasiveness of these schemes, but the scale of the

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[5] Michael Mazerov, Center on Budget and Policy Priorities, *Should Congress Authorize States to Continue Giving Tax Breaks to Businesses?* 11 (2005), *available at* http://www.cbpp.org/2-18-05sfp.pdf, citing Patrice E. Treubert, IRS, *Corporation Income Tax Returns, 2001*, in *Statistics of Income Bulletin* 138 (Summer 2004), and Robert Cline et al., Ernst & Young, *Total State and Local Business Taxes* (Jan. 2004). *See also* Robert G. Lynch, *Weaknesses in the Common Arguments for State and Local Tax Cuts and Incentives*, 32 State Tax Notes 597, 598 n.1 (May 24, 2004).

[6] Washington Legal Foundation, Amicus Br. Appendix at A-1 *et seq.*

effort they involve. Behind the tax incentive programs in each state is a bureaucratic apparatus devoted to creating and granting such incentives. Comparable activity has developed on the corporate side. Indeed, a veritable industry has grown up around these incentives, backed by a legion of lawyers and accountants. There are even "site location consultants" who work on commission. All of these activities and resources are devoted to the struggle to get firms to locate here and not there.[7] We have what many commentators call a "race to the bottom."

Third, the cost of these schemes is very great. The best estimates place the cost for all the states and local

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[7] Time Magazine has described all this activity vividly:

> If corporate welfare is an unproductive end game, why does it keep growing in a period of intensive government cost cutting? For starters, it has good p.r. and an army of bureaucrats working to expand it. A corporate-welfare bureaucracy of an estimated 11,000 organizations and agencies has grown up, with access to city halls, statehouses, the Capitol and the White House. They conduct seminars, conferences and training sessions. They have their own trade associations. They publish their own journals and newsletters. They create attractive websites on the Internet. And they never call it "welfare." They call it "economic incentives" or "empowerment zones" or "enterprise zones."

Donald L. Barlett & James B. Steele, *Corporate Welfare, Special Report*, Time, Nov. 9, 1998, at 36, 39.

governments combined at between $40 and 50 billion annually.[8]

Fourth, states are not completely irrational; they would not deliberately give away large amounts of resources in a very uncertain effort, except for the belief that such incentives are available elsewhere and that the politics of the situation compels that they be matched. Commentators have frequently noted that the states individually are in a classic "prisoner's dilemma."[9] That is, they would be better off if they cooperated rather than being played off against each other.[10]

In bargaining with the states one at a time, the corporations are well aware of their advantages. Economists have long noted that a disparity in access to information can radically skew the efficient market outcome.[11] In trying to

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[8] Alan H. Peters & Peter S. Fisher, *The Failures of Economic Development Incentives*, 70:1 J. Am. Plan. Ass'n 27, 28 (Winter 2004).

[9] See Graham Bannock et al., *The Penguin Dictionary of Economics* 307-08 (7th ed. 2003), for an extensive discussion of the dilemma.

[10] The "prisoner's dilemma" does not depend on an actual dilemma, but only on the perception that the dilemma exists. In the case at hand, we do not contend that each state actually faces the necessity of providing competing investment incentives. On the contrary, there are more effective and efficient ways to promote investment. The fact that state officials believe themselves to be caught in such a dilemma is reflected in the Amicus Brief of the States at 21.

[11] Joseph E. Stiglitz, Information and the Change in the Paradigm in Economics, Nobel Prize Lecture (Dec. 8, 2001), *available at*

develop its investment incentives, each state faces a serious disadvantage relative to the firms bargaining for the incentives. Justice Jackson's farmers and craftsmen are not the ones on the other side of the table. In 2004, DaimlerChrysler had more employees than the city of Toledo had people – about 70,000 more,[12] and it had total revenue four times the budget for the entire State of Ohio.[13]

At this point, we are left with what appears, on its face, to be a system of competing incentives that produces few if any of the benefits intended by its creators and advocates, but involves massive costs. On the margin, such incentives are no doubt able on occasion to successfully influence a business investment decision. But the effectiveness of the system is undermined by its central feature: a pervasiveness driven by a kind of interstate rivalry that is an affront to the basic intent of the Commerce Clause. Paradoxically, it is the pervasiveness of the system that both sustains it and, at the same time, limits its effects. Petitioners attempt to find a contradiction in the Respondent's allegation that tax incentives are both ineffectual and injurious. Of course, no one would claim that tax incentives are never effective. In those infrequent

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http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001_Nobel_Lecture.pdf.

[12] DaimlerChrysler Corp., *Company at a Glance - A Truly Global Company, available at* http://www.daimlerchrysler.com/dccom/0,,0-5-7155-1-12898-1-0-0-0-0-0-243-7155-0-0-0-0-0-0-0,00.html.

[13] Office of Budget and Mgmt., State of Ohio, *Budget Highlights - Fiscal Years 2004 and 2005* (2003), *available at* http://www.obm.ohio.gov/budget/operating/executive/0405/highlights0405.pdf.

instances when all other factors balance out, they certainly can tip the decision to locate in the jurisdiction offering the incentive. When they do so, they do harm to the concept of a national market. But this is not the end of it; they are harmful even when they do not succeed in attracting significant new investment. To the extent that one state offers incentives, it inspires similar conduct in other states. The race-to-the-bottom itself is harmful to the concept of a national economy. As in any race, there are more losers than winners.

## STATE INVESTMENT TAX CREDITS WASTE SCARCE PUBLIC RESOURCES AND SHIFT THE TAX BURDEN TOWARD LOW AND MODERATE-INCOME HOUSEHOLDS

Petitioners contend that "far from erecting a barrier to interstate commerce, tax credits like Ohio's promote commerce – interstate and intrastate – by spurring competition between the States to create attractive environments for capital investment and economic development." (DaimlerChrysler Petr.'s Br. 10).

This statement simply does not bear close examination. The question of the costs and benefits of investment incentives has produced a vast volume of literature. Two economists who conducted an extensive and scholarly review of this literature concluded:

> The upshot of all of this is that on this most basic question of all–whether incentives induce significant new investment or jobs–we simply do not know the answer. Since these programs probably cost state and local

> government about $40–50 billion a year, one would expect some clear and undisputed evidence of their success. This is not the case. In fact, there are very good reasons–theoretical, empirical, and practical–to believe that economic development incentives have little or no impact on firm location and investment decisions.[14]

The $40–50 billion cost does have an acknowledged impact. It is $40–50 billion that the states and local governments do not have for other purposes including economic development.[15] Ironically, Petitioner DaimlerChrysler contends that this case puts "[a]t risk ... infrastructure improvements, and even perhaps vocational training programs...." (DaimlerChrysler Petr.'s Br. 37). In fact, it is the enormous cost of the tax incentive system that puts these infrastructure and education programs in jeopardy.

The economist, Robert G. Lynch, conducted an extensive review of the econometric literature on tax cuts and incentives for businesses. He finds,

> A review of the hundreds of econometric and representative firm studies that have evaluated the effects of state and

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[14] Peters & Fisher at 32, *supra* note 8.

[15] It is notable that most of the economic studies that find some benefit from location incentives *assume* that the costs of such incentives do not result in a reduction of government services. Robert G. Lynch, *The Effects of State and Local Taxes and Public Services on Economic Development*, 32 State Tax Notes 767, 768 (June 7, 2004).

> local tax cuts and incentives makes clear that those strategies are unlikely to stimulate economic activity and create jobs in a *cost-effective* manner.[16]

More importantly, he concludes,

> Indeed, most econometric studies suggest that public services such as education and infrastructure spur economic growth and influence business location decisions. Hence, as Bartik writes, "[a]n economic development policy of business tax cuts may fail to increase jobs in a state or metropolitan area if it leads to a deterioration of public services to business. An economic development policy of tax increases may succeed in increasing jobs if it significantly improves public services to business. Policy makers must consider both tax and public service effects on business if they are to successfully increase their area's job growth."[17]

The diversion of public resources away from effective business development is not the end of the harmful effects. In Federalist Paper No. 12, Alexander Hamilton expressed the fear that, if the government could not tax commerce, the burden would fall disproportionately on

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[16] *Id.* at 777.

[17] *Id.* at 778, citing Timothy J. Bartik, W.E. Upjohn Institute for Employment Research, *Who Benefits from State and Local Economic Development Policies?* 8-9 (1991).

farmers, that is, the ordinary Americans of that day: "Revenue ... must be had at all events. In this country if the principal part be not drawn from commerce, it must fall with oppressive weight upon land."[18] Over the past two decades the tax burden of state and local government has become increasingly regressive. In a study of 20 of the most industrialized states, Peter Fisher found that "incentive wars have proceeded to the point that state corporate income taxes are on the verge of disappearing in some states, at least with regard to new investment."[19] Making up for this revenue loss has become more and more the burden of lower and moderate income households. Over the last decade the state and local tax burden has become increasingly regressive.[20]

California provides an excellent example of what has happened at the state level. According to the California Budget Project,

> Over the past two decades, the burden of funding state services has shifted from corporate to personal income taxpayers. The personal income tax is expected to provide 49.5 percent of General Fund revenues in 2004-05, up from 35.4 percent in 1980-81. Corporate tax receipts are expected to provide 10.9 percent of General Fund revenues in

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[18] The Federalist No.12, at 91 (Alexander Hamilton), *supra* note 1.

[19] Greg LeRoy, *The Great American Jobs Scam* 173 (2005).

[20] Nicholas Johnson & Daniel Tenny, Center on Budget and Policy Priorities, *The Rising Regressivity of State Taxes* (Jan. 15, 2002), *available at* http://www.cbpp.org/1-15-02sfp.pdf.

> 2004-05, down from 14.6 percent in 1980-81. New, increased, and expanded corporate tax breaks and the 1996 corporate rate reduction are responsible for the decline in the share of state revenues provided by the corporate income tax. Tax reductions enacted between 1997 and 2004 alone will reduce 2004-05 revenues by $7.2 billion.[21]

This, in turn, has had an effect on the progressivity of the tax system:

> In 2002, the most recent year for which data are available, 347,189 taxpayers reported incomes of $200,000 or more. However, 1,334 of these households paid *no* California personal income tax. How did they do it? The largest tax breaks claimed by "no tax" households include enterprise zone tax breaks, the Manufacturers' Investment Credit, Los Angeles Revitalization Zone Credits, and miscellaneous deductions. The number of high income "no tax" returns more than doubled between 1999 and 2002.[22]

The system of competing incentives has another effect that is harder to quantify. It does not show up in the economists' data nor can it be gotten from regression

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[21] California Budget Project, *Who Pays Taxes in California?* 2 (Apr. 15, 2005), *available at* http://www.cbp.org/2005/0504_whopaystaxes2005.pdf.

[22] *Id.* at 3.

analyses or econometric studies. This is the erosion of public confidence in and respect for government and its processes. The number of press accounts reciting the failures of location incentives to justify their cost and live up to expectations are too numerous to dismiss as merely anecdotal. The enthusiastic press coverage of plant openings and new jobs is regularly followed by articles on promises broken and expectations not met.[23] The appearances of the incentive system are not good. In an article about the government incentives for sports facilities, one economist made this general comment:

> Corporate welfare is always unsavory business. The politically connected and high-profile gain at the expense of business owners and consumers who work hard day to day but have no so-called friends in high places. Decisionmaking is shifted from the private sector, which is guided by price and profit signals to meet and create consumer demand, to the public sector, which is guided by politics and the quest for power. Taxes are increased on the many, so that resources can be funneled to a select few . . . .[24]

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[23] Numerous stories of the failure of investment incentives to meet promises are collected in Barlett & Steele at 40, *supra* note 7; and more recently in Greg LeRoy, *supra* note 19. In no area has the failure of investment incentives to deliver promised benefits been more conspicuous than in the promotion of sports facilities.

[24] Raymond J. Keating, *You're Out! Corporate Welfare for Major League Baseball*, 91 Tax Notes 1739, 1753 (June 4, 2001).

## INTERSTATE TAX COMPETITION DAMAGES COMITY AMONG STATES

The fierce competition among the states for jobs and investment has eroded the normal comity among the states. The ill will between California and Nevada has reached the level of radio ads and billboards seeking to lure business away from each other. A recent editorial in the Los Angeles Times on the current tax feud was captioned "A Crooked Game in Nevada."[25] The struggle between Maryland and Virginia over the location of the Marriott International headquarters became exceptionally nasty, particularly after Maryland gave Marriott around $40 million to stay in Maryland, only to learn that the firm's flirtation with Virginia was simply a ploy to raise Maryland's bid.[26] But perhaps the worst behavior came from the Michigan legislature, which just this December passed a new tax incentive which is expressly limited to firms that could show that the new jobs in Michigan were taken from other states.[27] It is not coincidental that discussions of interstate tax competition often reference the conflagration that nearly tore our nation apart.[28]

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[25] Sept. 27, 2005, at B12.

[26] Jay Hancock, *Marriott Used Va. as Ruse to Raise Md. Bid; Public Records Suggest Bethesda Firm's Threat to Leave Was Bluff*, Baltimore Sun, Mar. 27, 1999, at 1A.

[27] Public Act 293, Public Acts of 2005. The Governor approved it on December 20, 2005 and it was filed with the Secretary of State on the same day.

[28] *See, e.g.*, Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States, in* Federal

## CONCLUSION

The Ohio ITC violates the Commerce Clause of the Constitution. It discriminates against interstate commerce, contributes to a system of discriminatory tax competition which is inconsistent with the concept of an open national economy, and coerces in-state investments to the detriment of the national economic well-being. It contributes to unhealthy rivalry and animosity among the states, which the Constitution sought to mitigate.

We respectfully request this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Dated: January 23, 2006

Respectfully submitted,

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Reserve Bank of Minneapolis, Annual Report (1994), *available at* http://minneapolisfed.org/pubs/ar/ar1994.cfm.

# APPENDIX

## Ohio's Investment Tax Credit Discriminates Against an Out-of-State Investment by a Firm Taxable in Ohio, Even If the Other State Has a Corporate Tax Structure Identical to Ohio's

It is easy to demonstrate that in a typical corporate expansion scenario, Ohio's Investment Tax Credit (ITC) discriminates against an out-of-state investment by a firm already taxable in Ohio *even if the other state into which the investment might be placed has an identical ITC and a corporate income tax structure otherwise identical to Ohio's.*

Consider competitors XYZ Corp. and ABC Corp., both of which have a $10 million facility in Ohio and are contemplating a new $5 million facility to serve new markets outside of Ohio that the companies have identified. Both are deciding whether to build the new plant in Ohio or in Other State. Assume that the nationwide sales of the two competitors are currently $10 million, that their sales in both Ohio and Other State are $1 million, that the payroll at the existing plants is $3 million, and that the nationwide profit of both corporations is $1 million annually. Assume that the proposed 50 percent expansion of the firms' asset base will result in a corresponding 50 percent increase in their nationwide sales, payrolls, and profits. Assume that the expansion will generate no additional sales in Ohio or Other State. Note that Ohio gives a three-fifths (60 percent) weight to the sales factor in its corporate income tax apportionment formula, that its corporate income tax rate is 8.5 percent (ignoring the lower rate on the first $50,000 of taxable income for the sake of simplifying the example), and that only one-seventh of the 13.5 percent investment tax credit available in distressed areas may be claimed each year.

Assume that Other State has a corporate tax structure and ITC identical to Ohio's. Assume that both corporations are taxable in Other State notwithstanding a lack of physical presence there because their employees visit from Ohio and engage in activities in Other State that remove the corporate income tax immunity conferred by Public Law 86-272, 15 USC Sections 381-4. Finally, assume that the Ohio plants of both companies are sufficiently old that the original ITC available in connection with the investment in the plants has been fully claimed.

**XYZ Corp. Builds New Plant in Ohio**

XYZ Corp. expands in Ohio. The financial statistics relevant to its corporate income tax apportionment calculations in Ohio and Other State are as follows:

| | Property | Payroll | Sales |
|---|---|---|---|
| Ohio | $10,000,000 old plant<br>$5,000,000 new plant | $3,000,000 old plant<br>$1,500,000 new plant | $1,000,000 |
| Other State | $0 | $0 | $1,000,000 |
| Everywhere | $15,000,000 | $4,500,000 | $15,000,000 |

*XYZ's profit taxable by Ohio*:

$$= \$1{,}500{,}000 * \left[ \frac{\left(\frac{\text{property of XYZ in Ohio}}{\text{property of XYZ everywhere}}\right) + \left(\frac{\text{payroll of XYZ in Ohio}}{\text{payroll of XYZ everywhere}}\right) + 3 * \left(\frac{\text{sales of XYZ in Ohio}}{\text{sales of XYZ everywhere}}\right)}{5} \right]$$

$$= \$1{,}500{,}000 * \left[\frac{\left(\frac{\$15{,}000{,}000}{\$15{,}000{,}000}\right) + \left(\frac{\$4{,}500{,}000}{\$4{,}500{,}000}\right) + 3 * \left(\frac{\$1{,}000{,}000}{\$15{,}000{,}000}\right)}{5}\right]$$

$$= \$1{,}500{,}000 * \left[\frac{1.00 + 1.00 + 3 * .067}{5}\right]$$

$$= \$1{,}500{,}000 * .44$$

= $660,000 (taxable income apportioned to Ohio)

Tax liability to Ohio before investment tax credit = $660,000 taxable income * .085 = $56,100

Investment tax credit = ($5,000,000 new plant * .135 credit)/7 = $96,429

Since the investment tax credit exceeds the pre-credit liability and is non-refundable, XYZ Corp.'s tax liability to Ohio is $0 in the first year if it makes the new investment in Ohio.

*XYZ's profit taxable by Other State*:

$$= \$1{,}500{,}000 * \left[\frac{\left(\frac{\text{property of XYZ in Other State}}{\text{property of XYZ everywhere}}\right) + \left(\frac{\text{payroll of XYZ in Other State}}{\text{payroll of XYZ everywhere}}\right) + 3 * \left(\frac{\text{sales of XYZ in Other State}}{\text{sales of XYZ everywhere}}\right)}{5}\right]$$

$$= \$1{,}500{,}000 * \left[\frac{\left(\frac{\$0}{\$15{,}000{,}000}\right) + \left(\frac{\$0}{\$4{,}500{,}000}\right) + 3 * \left(\frac{\$1{,}000{,}000}{\$15{,}000{,}000}\right)}{5}\right]$$

$$= \$1{,}500{,}000 * \left[\frac{0 + 0 + 3 * .067}{5}\right]$$

$$= \$1{,}500{,}000 * .04$$

= $60,000 (taxable income apportioned to Other State)

Tax liability to Other State = $60,000 taxable income * .085
= $5,100

**ABC Corp. Builds New Plant in Other State**

XYZ Corp.'s competitor, ABC Corp., decides to build *its* new plant outside of Ohio, in Other State. Recall again the simplifying assumption that neither company will have new customers in Other State. The financial statistics relevant to the apportionment calculation now are as follows:

| | Property | Payroll | Sales |
|---|---|---|---|
| Ohio | $10,000,000 old plant | $3,000,000 old plant | $1,000,000 |
| Other State | $5,000,000 new plant | $1,500,000 new plant | $1,000,000 |
| Every where | $15,000,000 | $4,500,000 | $15,000,000 |

*ABC's profit taxable by Ohio*:

$$= \$1{,}500{,}000 * \left[ \frac{\left( \frac{\text{property of ABC in Ohio}}{\text{property of ABC everywhere}} \right) + \left( \frac{\text{payroll of ABC in Ohio}}{\text{payroll of ABC everywhere}} \right) + 3 * \left( \frac{\text{sales of ABC in Ohio}}{\text{sales of ABC everywhere}} \right)}{5} \right]$$

$$= \$1{,}500{,}000 * \left[ \frac{\left( \frac{\$10{,}000{,}000}{\$15{,}000{,}000} \right) + \left( \frac{\$3{,}000{,}000}{\$4{,}500{,}000} \right) + 3 * \left( \frac{\$1{,}000{,}000}{\$15{,}000{,}000} \right)}{5} \right]$$

$$= \$1{,}500{,}000 * \left[ \frac{.667 + .667 + 3 * .067}{5} \right]$$

$$= \$1{,}500{,}000 * .307$$

= $460,000 (taxable income apportionable to Ohio)

Tax liability to Ohio = $460,000 * .085 (corporate tax rate) = $39,100

*ABC's profit taxable by Other State*:

$$= \$1{,}500{,}000 * \left[ \frac{\left( \frac{\text{property of ABC in Other State}}{\text{property of ABC everywhere}} \right) + \left( \frac{\text{payroll of ABC in Other State}}{\text{payroll of ABC everywhere}} \right) + 3 * \left( \frac{\text{sales of ABC in Other State}}{\text{sales of ABC everywhere}} \right)}{5} \right]$$

$$= \$1{,}500{,}000 * \left[ \frac{\left( \frac{\$5{,}000{,}000}{\$15{,}000{,}000} \right) + \left( \frac{\$1{,}500{,}000}{\$4{,}500{,}000} \right) + 3 * \left( \frac{\$1{,}000{,}000}{\$15{,}000{,}000} \right)}{5} \right]$$

$$= \$1{,}500{,}000 * \left[ \frac{.333 + .333 + 3 * .067}{5} \right]$$

= $1,500,000 * .1733

= $259,950 (taxable income apportioned to Other State)

Tax liability to Other State before investment tax credit = $259,950 taxable income * .085 = $22,096

Investment tax credit = ($5,000,000 new plant * .135 credit)/7 = $96,429

Since the investment tax credit exceeds the pre-credit liability and is non-refundable, ABC Corp.'s tax liability to Other State is $0 in the first year if it makes the new investment in Other State. However, it remains liable for $39,100 of tax in Ohio.

**Conclusion: Investment Tax Credit Discriminates Against Interstate Commerce**

If XYZ Corporation builds its new plant in Ohio, its total Ohio state tax liability in the first year of the investment is $0. Not only does the ITC offset the entire increase in its Ohio tax liability arising from the increase in its Ohio apportionment factor arising from the additional property and payroll it has placed in Ohio, but it is able to use some of the investment tax credit to completely eliminate the portion of Ohio tax liability attributable to its preexisting activity in the state. XYZ's total tax liability in the two states is $5,100, because it remains liable for tax in Other State, where it has no ITC to claim.

If XYZ's identically-situated competitor, ABC Corp., chooses to build *its* new plant in Other State, while it has no

tax liability to Other State due to Other State's investment tax credit, it remains liable for the full amount of its Ohio tax liability, $39,100. This is more than seven times the total tax liability of its competitor, XYZ.

In short, under a realistic scenario of a 10 percent return on assets and a realistic, 50 percent expansion of production capacity, Ohio's investment tax credit is biased against a cross-border expansion and, hence, against interstate commerce. A multi-year analysis yields the same conclusion; the ITCs available to the two companies in both states are sufficiently large to replicate the first-year results for 10 years, at which point the allowed "carryforward" of the ITC expires.

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Nos. 04-1704 & 04-1724

# In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
*Petitioners*,
v.
CHARLOTTE CUNO, ET AL.,
*Respondents*.

*and*

WILLIAM W. WILKINS TAX COMM'R FOR THE STATE OF OHIO, ET AL.,
*Petitioners*,
v.
CHARLOTTE CUNO, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

**BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, MICHIGAN CHAMBER OF COMMERCE, OHIO CHAMBER OF COMMERCE, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, DETROIT REGIONAL CHAMBER OF COMMERCE, AND TOLEDO AREA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS**

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## INTEREST OF *AMICI CURIAE*

This *amici curiae* brief in support of the briefs of Petitioners is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for Petitioners and Respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The Chamber of Commerce of the United States of America is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and State courts throughout the country on issues of national concern.

The Kentucky Chamber of Commerce is the largest broad-based business association in Kentucky, representing more than 7,000 businesses.

The Michigan Chamber of Commerce is a non-profit membership organization which represents the interests and views of over 6,500 private corporations and businesses engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The Ohio Chamber of Commerce, founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part and that no entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

interests of its 4,000 business members while building a more favorable Ohio business climate.

The Tennessee Chamber of Commerce and Industry is the State chamber of commerce and manufacturers' association, representing more than 1,000 members across Tennessee from all facets of business and industry.

The Detroit Regional Chamber of Commerce is a non-profit business advocacy organization, representing more than 21,000 businesses in Southeast Michigan.

The Toledo Area Chamber of Commerce is a broad-based non-profit membership organization in Toledo, Ohio, which represents more than 3,700 businesses.

Each of the above-listed organizations works to enhance the economy and business climate of the State or region it serves. All have a collective interest in this case because the court of appeals' decision has created legal uncertainty which will diminish the value and effectiveness of business tax incentives in Kentucky, Michigan, Ohio, and Tennessee, as well as in States in Circuits other than the Sixth Circuit, and will thereby hinder industrial development in those States.

## SUMMARY OF THE ARGUMENT

The Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, Tennessee Chamber of Commerce and Industry, Detroit Regional Chamber of Commerce, and Toledo Area Chamber of Commerce (the "Chambers") submit this brief as *amici curiae* in support of the briefs of Petitioners.

*Amici* urge this Court to reject Respondents' anti-incentive political agenda, which is based on an ill-informed and outdated understanding of the global economic forces central to business investment decisions in today's economy.

Contrary to Respondents' assertion, this Court cannot free the States from the competition for business investment because that competition is global, not national. Incentives are not part of a zero-sum game pitting States against each other, but a tool used by States to compete effectively with Canada, Mexico and other nations to attract major capital investments which strengthen the United States economy as a whole.

This Court should analyze this case in light of its existing Commerce Clause jurisprudence, which sensibly draws a distinction between unlawful trade barriers and lawful credits, subsidies, and other purely intra-state activities which make an adopting State an attractive place to do business without placing burdens on interstate trade. That distinction is economically meaningful because, while it prevents the creation of trade barriers which impede commerce and impoverish the nation, it allows the creation of incentives, like the tax credits at issue, which have the aggregate effect of lowering costs for intra-state and interstate businesses alike. Grounded in an analysis of economic effects, this Court's existing analytical framework does not require the sort of tortured, formalistic reasoning that the court of appeals necessarily employed in its effort to distinguish Ohio's investment tax credit from run of the mill business subsidies that this Court has long recognized as constitutional. This Court's existing jurisprudence, moreover, carries out the clear intent of the Framers, who created the Commerce Clause to prohibit protectionist tariffs, not to solve what Respondents perceive to be the problem of low aggregate tax rates for businesses. This Court should apply its existing Commerce Clause doctrine to validate the statute at issue, an incentive which lowers the cost of doing business in Ohio without imposing any barrier to goods and services provided in interstate commerce. The Court should reject the Respondents' self-described "novel legal theory" that the

Commerce Clause prohibits laws which affect interstate commerce by making a State attractive to business investment.

To the extent Respondents can assemble empirical support for their view that incentives are bad public policy, they should bring that evidence to the attention of Congress. That body is empowered to create a national policy regarding business incentives that balances the obvious and overwhelming benefits generated by major capital investments like the DaimlerChrysler facility at issue against the perceived, albeit unproven, economic inefficiencies and other costs that Respondents claim such incentives impose on the States. As in *Quill Corp. v. North Dakota*, this Court should reverse the court of appeals' decision, leaving to Congress a clear path for such action as Congress may deem prudent and necessary. 504 U.S. 298 (1992).

## ARGUMENT

### I. THE COURT OF APPEALS' DECISION ADVANCES A POLICY AGENDA THAT IS NOT MANDATED BY THE COMMERCE CLAUSE AND THAT IS GROUNDED IN A FUNDAMENTAL MISUNDERSTANDING OF THE GLOBAL NATURE OF THE COMPETITION FOR HIGH-WAGE JOBS.

This Court has long recognized that each State has broad authority to craft tax laws to meet the particularized needs of its citizens and, accordingly, that application of the Commerce Clause requires a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing power." *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984). The court of appeals' decision upsets this balance, radically expanding the reach of the Commerce Clause anti-discrimination principle to usurp States' authority in the area of business tax incentives. In so

doing, the court of appeals has signed on to a very particular policy agenda, in effect substituting the economic prepossessions of a self-selected group of consumer advocates and legal academicians for the judgment of the elected representatives of the people of Ohio. An examination of the assumptions underlying the anti-incentive agenda promoted by the Respondents and embraced by the court of appeals reveals that it is based on an outdated understanding of the global economic forces that confront State actors charged with the responsibility to attract and maintain high-wage jobs and business investments for the benefit of their constituents. As such, it provides a textbook example of the sort of impractical, ill-informed policy that often results when interest groups use the courts to avoid the deliberative, analytical processes necessary to effect economic policy through legislation.

The central assumption underlying Respondents' agenda is that States use incentives like Ohio's investment tax credit to compete amongst themselves for a finite pool of investment capital and that, therefore, incentives provide no net gain for the national economy the Commerce Clause was designed to protect. As Respondents observed in their Brief in Response to Petition for Certiorari:

> [I]t has never been Respondents' intention to single out Ohio's incentive programs as distinctly problematic, nor to place Ohio (or the Sixth Circuit states) at a competitive disadvantage vis a vis the rest of the nation. Instead, *Respondents anticipate that a clear statement of the unconstitutionality of discriminatory tax incentives will free all the states from the necessity of engaging in an escalating competition over incentives that deprives all of them of needed revenues, while gaining a meaningful advantage for none.*

Respondents' Brief in Response to Petition for Certiorari at 5-6, *DaimlerChrysler Corp., et al. v. Cuno* and *Wilkins v. Cuno* (Nos. 04-1704 and 04-1724) (emphasis supplied). Thus, Respondents and their academic supporters urge this Court to "save the states from themselves" by creating a "level playing field" on which they can compete for business investment. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 398 (1996) (making the empirically incorrect assertion that "the incentives competition is, for the States collectively, at best a zero-sum game ... the business that one state attracts is a business that would have gone to another state").

Respondents' arguments postulate an economy that no longer exists. The "playing field" on which States compete today for business investments is not the nation, but the world. Incentives are not part of a "zero-sum game" in which one State's gain is inevitably another's loss, with no aggregate benefit to the national economy. Rather, incentives allow States to compete with Mexico, Canada and other nations to attract valuable industries and thereby strengthen the economy of the entire nation. The likely result of Ohio not being able to offer incentives to DaimlerChrysler to create or keep jobs in Toledo as a consequence of this case is not that these jobs will migrate to Alabama or Georgia, but that they will likely go to an existing DaimlerChrysler plant in Canada, Mexico or Europe and leave the United States altogether. Conversely, plants that are successfully recruited in part with incentives are often obtained in competition with other countries and thus represent a net gain not only to the recruiting State but also to the nation's economy as a whole. As was stated by Ohio's Lieutenant Governor Bruce Johnson in testimony before Congress:

> We live in an increasingly global marketplace, where a company's very survival depends on its ability to be lean and efficient. This market demands that I be able to offer incentives in order for Ohio to compete against its regional neighbors; not only with other States, but also countries like Canada and Mexico. Case in point: Ontario, Canada, lists Ohio as one of its chief competitors, and offers at least nine tax incentives to encourage investment. You can find them on their website.
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> We believe the flexibility to put together aggressive, customized incentive packages is critical to securing these projects. Take for example projects like Lab One's $18.4 million expansion of its laboratory facilities in Cincinnati, or the United States Enrichment Corporation's decision to invest $1.1 billion creating 500 high-paying jobs in rural southern Ohio. Ohio won out over facilities in Asia and Mexico when the Whirlpool Corporation chose to invest $143 million in several Ohio facilities.

*Economic Development and the Dormant Commerce Clause: The Lessons of Cuno v. DaimlerChrysler and Its Effect on State Taxation Affecting Interstate Commerce*, Joint Hearing Before Subcomm. on the Constitution and Subcomm. on Commercial and Administrative Law, 109th Cong., 1st Sess. 27 (2005). Far from "sav[ing] the states from themselves," the court of appeals' decision hobbles the States in their ongoing efforts to compete in the global economy.

The forces of global competition are particularly fierce in the automotive industry at the center of this lawsuit. In the past two decades, automotive manufacturers have expanded beyond their historic national bases of operation, constructing

major production facilities around the globe. Major Asian and European manufacturers—BMW, Honda, Mercedes, Mitsubishi, Nissan, NUMMI, Subaru-Isuzu and Toyota—have all built plants in the United States. ECONOMICS AND BUSINESS GROUP CENTER FOR AUTOMOTIVE RESEARCH, THE CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR TO THE U.S. ECONOMY: AN UPDATE (2005) (available at http://www.cargroup.org/pdfs/AIAMFinal.PDF) (prepared for the Association of International Automobile Manufacturers, Inc.). At the same time, U.S., European and Asian manufacturers have dramatically expanded their presence in Mexico. JOHN HUMPHREY AND OLGA MEMODOVIC, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, THE GLOBAL AUTOMOTIVE INDUSTRY VALUE CHAIN: WHAT PROSPECTS FOR UPGRADING BY DEVELOPING COUNTRIES, 7 (2003) (available at http://www.unido.org/file-storage/download/?file_id=11902); *see also* JUAN CARLOS MORENO BRID, MEXICO'S AUTO INDUSTRY AFTER NAFTA; A SUCCESSFUL EXPERIENCE IN RESTRUCTURING?, WORKING PAPER #232 (August 1996) (available at http://www.nd.edu/~kellogg/WPS/232.pdf) (describing Mexican operations of major producers). Thus the decision to locate an automotive production line is now made by international companies that can readily evaluate the costs and competing benefits offered by the many States and nations in which they conduct business.

This competition for automotive investment is especially acute in North America, where the Mexican auto industry has risen over the past decade to directly challenge the United States at every level of production. As one study recently observed, there is now an "auto corridor that extends from Mexico City to Atlanta." Keith Phillips et al., *Gauging the Impact of the San Antonio Toyota Plant*, VISTA – SOUTH TEXAS ECONOMIC TRENDS AND ISSUES (Federal Reserve Bank

of Dallas, San Antonio Branch, San Antonio, TX), Spring 2004 (available at http://dallasfed.org/research/vista/vista0401.pdf). GM, Ford, DaimlerChrysler, Nissan, VW Group and Honda all have major assembly plants operating in the Mexican portion of that corridor. HUMPHREY & MEMODOVIC, *supra*, at 7. Total employment at these Mexican facilities—652,000 in 2002—rivals employment in the top six automotive-producing States—Michigan, Indiana, Ohio, Kentucky, Illinois and Tennessee, which was 670,000 during the same period. Phillips, *supra*. Qualitatively, the Mexican auto industry has transformed itself from a low cost parts producer to a direct competitor employing "sophisticated product design, development and research" to manufacture finished vehicles. Jorge Carrillo, *Transactional Strategies and Regional Development; The Case of GM and Delphi in Mexico*, 11 JOURNAL OF INDUSTRY STUDIES 127 (2004). Reflecting this transformation, Mexico's total exports of vehicles rose from 18,245 to 1.8 million between 1980 and 2001—with ninety percent exported to North America. HUMPHREY & MEMODOVIC, *supra*, at 11. State economic development officials working to attract and preserve automotive jobs must therefore labor with an ever-present awareness that a robust competitor with ties to virtually every major manufacturer offers a realistic, low cost alternative site for virtually every potential plant or production line—an even more viable alternative since the advent of the North American Free Trade Agreement, which precludes tariff barriers among the three North American signatories. *Id.* at 10 (noting that the "NAFTA Agreement created the basis for much deeper integration" of member states' automotive industries).

Global competition is hardly a secret or obscure phenomenon. A decade ago, this Court noted that "[i]ncreasing global competition has ... made primary and

secondary education economically more important. The portion of the American economy attributable to international trade tripled between 1950 and 1980." *United States v. Lopez*, 514 U.S. 549, 621 (1995). International competition is now an ever-present topic in the popular press and even the focus of best-selling books. *See, e.g.*, Danny Hakim, *For a G.M. Family, the American Dream Vanishes*, N.Y. TIMES, November 19, 2005, at A2 (noting that "domestic automakers and suppliers are fighting to survive brutal global competition"); THOMAS FRIEDMAN, THE WORLD IS FLAT; A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 117 (2005) (generally describing increasing global competition and noting the "process of competitive flattening, in which countries scramble to give companies the best tax breaks, education and subsidies ... to encourage offshoring to their shores"). Yet to read Respondents' briefs one would have no idea that the phenomenon of global competition even exists. This omission is particularly startling when one considers the precise issue in this case—the validity of incentives offered to induce a German company with automotive assembly plants on three continents to invest in the United States. Respondents' opposition to incentives is grounded in an assumption that States are competing solely with each other and that this Court has the power to "free all the states from the necessity of engaging in an escalating competition." Respondents' Brief in Response to Petition for Certiorari, *supra*, at 6. The reality is that the States' fiercest competitors for plants like the DaimlerChrysler facility at issue are in other nations beyond this Court's jurisdiction. Respondents' failure to grasp this central reality of today's economy upends the entire logical framework underpinning Respondents' arguments and underscores what a poor substitute academic commentators are for legislators in the arena of economic development.

Tax incentives offered to automotive manufacturers are a reasoned response by States not only to the intense global competition for investment but also to the extraordinary benefits generated by that particular industry. A facility like DaimlerChrysler's Jeep plant in Toledo, in and of itself, can be the linchpin which lifts thousands of families into the middle class. On average, a job in one of the automobile assembly plants established in the United States by international manufacturers pays $59,000 in salary and benefits—nearly twice the average wage in States directly affected by the court of appeals' decision. CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR, *supra*, at 13; Bureau of Labor Statistics, State Average Annual Wages for 2001-2002 (visited December 1, 2005) <http://www.bls.gov/cew/state2002.txt>[2]. Moreover, jobs in automotive plants are a small fraction of the total employment created by such investments. For each direct hire at an automotive assembly plant, on average 9.4 additional jobs are created at automotive suppliers and other businesses. *Id.* at 18.

Even these geometric increases in employment have proven to be just the tip of the iceberg of economic benefits accruing to those States that have successfully recruited major automotive investments. In State after State, initial investments in a single plant have generated years of expansions and additional, related investments. In Ohio, for example, Honda's small initial investment in a 64-employee motorcycle plant in 1979 paved the way for four plants representing a capital investment of $6.3 billion and employing 16,000 people. Ken Thomas, *Auto industry,*

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[2] Domestic manufacturers also offer very high-wage jobs. Average pay for GM's hourly workers, including benefits, was $74.00 per hour in 2004. Arundhati Parmar, *GM growth might bring 180 workers*, FORT WAYNE (Indiana) JOURNAL-GAZETTE, November 19, 2005, at B9.

*lawmakers watching S. Ct on tax incentive case*, ASSOCIATED PRESS, September 28, 2005. In Kentucky, Toyota's original 1985 investment of $800 million in a single assembly plant for 200,000 vehicles per year has expanded to a $4.5 billion plant producing 435,000 vehicles per year and employing 7,000 people. One Kentucky newspaper recently editorialized that "this one industrial recruiting success did more for the state than the entire agendas of other governors." THE PADUCAH (Kentucky) SUN, May 20, 2005. In Tennessee, Nissan's initial U.S. manufacturing facility, attracted in 1980 with a $30 million incentive package, has entirely transformed the State's economy, spawning the location of more than 950 parts plants collectively estimated to employ 33% of the State's manufacturing workforce. Bush Bernard, *Smyrna Nissan plant to add Pathfinder SUV*, THE TENNESSEAN, June 26, 2003, at 1A. Nissan itself has since opened an additional Tennessee manufacturing plant and increased its Tennessee employment from 2,200 in 1980 to approximately 8,000 in 2005. Bill Carey, *Force of Runyon's personality lured Nissan to Tennessee*, THE TENNESSEAN (Nashville), May 9, 2004, at 4E; Keith Russell, *Transfers, local hires to have shot at high-end jobs*, THE TENNESSEAN (Nashville), November 11, 2005, at 10A. All told, investments by international automotive companies in the United States had, by 2003, created 55,000 direct jobs and generated investment of over twenty-two billion dollars in the U.S. economy. CONTRIBUTION OF THE INTERNATIONAL AUTOMOTIVE SECTOR, *supra*, at 4.

Respondents question whether such substantial, long term economic benefits justify the cost of incentives like Ohio's investment tax credit, but tellingly present no conclusive empirical evidence to support their claims. At best "[e]mpirical studies that seek to evaluate [Respondents'] allegations are inconclusive." Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*,

82 MINN. L. REV. 447, 452 (December 1997). Certainly, the States that actually compete for investments believe that incentives are an effective and, indeed, essential tool for attracting automotive plants and similar facilities. And practical experience seems to bear out the theory, put forward by some commentators, that incentives, far from harming the national economy, actually assist in the rational allocation of resources therein. *Id.* at 448. The States that have provided substantial incentive packages, like Ohio, Tennessee and Kentucky, because of their existing automotive supplier base, have been the States that have stood to derive particularly significant economic benefits from automotive sector investment because the presence of suppliers substantially enhances the jobs multiplier effect of such direct investment. Phillips, *supra*. Those States also have larger numbers of low-wage workers in desperate need of high-paying jobs, while lacking some of the attributes, like ocean ports, natural resources, and established high-tech research communities, that drive the economies of many high-wage States that have not seen the need to provide similar incentive packages.

Proponents of Respondents' anti-incentive agenda have cautioned against "[a]ttributing to state political actors an unrealistic reservoir of both information and economic rationality." Enrich, *supra*, at 402. But Respondents' failure to acknowledge the global nature of the competition for jobs strongly suggests that the single court-mandated economic policy they promote would be neither optimal nor rational. To the extent the Respondents can assemble a coherent body of evidence to demonstrate that incentives are in fact bad economic policy, they should present that evidence to Congress or to the State legislatures that are best equipped to evaluate such evidence in light of countervailing evidence and in a position to react appropriately to changing economic and societal conditions. In the meantime, this Court should

decline Respondents' invitation to strait-jacket States with an outdated policy that has long been rendered irrelevant by the rapidly-changing world economy.

## II. CONSISTENT WITH ORIGINAL INTENT BEHIND THE COMMERCE CLAUSE, THIS COURT HAS PROPERLY DRAWN A DISTINCTION BETWEEN LAWS WHICH EFFECT UNCONSTITUTIONAL TARIFFS AND SIMILAR TRADE BARRIERS AND LAWS WHICH MERELY DECREASE THE COST OF DOING BUSINESS WITHIN A GIVEN TAXING STATE.

In its unanimous decision in *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 278 (1988), this Court succinctly articulated the thrust of its longstanding approach to business incentives under the Dormant Commerce Clause:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

In cases in which this Court has evaluated State business incentives under the Commerce Clause's anti-discrimination principle, it has consistently adhered to this central distinction between discriminatory trade barriers and non-discriminatory incentives which merely lower the cost of doing business in a given State. As many commentators have observed, this Court has consistently struck down as discriminatory those statutes that have imposed tariff-like barriers to interstate sales and movements or otherwise penalized taxpayers for engaging in interstate commerce. *See* Philip M. Tatarowicz and

Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 928 (May 1986). By contrast, this Court has upheld statutes which have merely "encourage[d] the growth and development of intra-state commerce and industry" through measures, like direct subsidies or apportionment schemes favorable to in-state businesses, which simply lower the cost of doing business in a taxing State without burdening interstate transactions. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977); *see, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976)(upholding subsidy); *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978)(upholding single factor apportionment scheme).

In striking down Ohio's investment tax credit, the court of appeals rejected the notion that this distinction embodied in this Court's decisions creates a principled rule of law:

> The defendants maintain that the Supreme Court's opinions should be read narrowly to hold that tax incentives ... are permissible as long as they do not penalize out-of-state economic activity...*In their view, the Commerce Clause is primarily concerned with economic protectionism* – that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce...*Although it is arguably possible to fit certain of the Supreme Court's cases into this framework, it is clear that the Court has not adopted this approach. . .*

*Cuno, et al. v. Daimler Chrysler, Inc., et al.*, 386 F.3d 738, 745 (2004) (emphasis supplied). Of course, this Court *has* repeatedly stated that the Commerce Clause was designed as a "barrier against protectionism." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1996); *see also, Fulton Corp. v. Faukner*, 516 U.S.

325, 330 (1994). Nevertheless, the court of appeals abandoned this Court's focus on protectionist measures in favor of the virtually limitless test for discrimination urged by the Respondents, holding that the Ohio credit is unconstitutional because "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states." *Cuno*, 386 F.3d at 745.

This Court should reject the court of appeals' unbridled expansion of the Commerce Clause in favor of its existing framework for at least three reasons. First, this Court's longstanding distinction between protectionist burdens on interstate commerce and purely intra-state incentives is economically meaningful because it protects interstate trade while leaving States free to reduce tax burdens on in-state businesses. Because this Court's approach is grounded in an analysis of the economic effects, it provides a workable test with discernable limits to courts' supervision of the nation's economy. Second, this Court's focus on protectionist trade barriers is consistent with the intent of the Framers, who enacted the Commerce Clause in response to interference with interstate commerce—protectionist tariffs. Third, this Court's existing Commerce Clause jurisprudence properly requires no artificial distinction between subsidies and tax credits, which are economically equivalent and should be treated alike for tax purposes. While Dormant Commerce Clause jurisprudence has been criticized as inconsistent, in the area of business incentives a workable rule consistent with original intent has emerged. That rule should be applied to the Ohio tax credit at issue—a purely intra-state incentive that imposes no trade barrier burdensome to businesses outside that State.

### A. This Court's Commerce Clause jurisprudence is grounded in an economically meaningful distinction between protectionist trade barriers and lawful in-state efforts to create a favorable business climate.

The decision of the court of appeals expands the concept of Commerce Clause discrimination into an entirely new economic realm. To date, this Court has only used the negative Commerce Clause to strike down statutes which have had a particular effect on the nation's economy—creating direct or indirect barriers to trade. As this Court observed in *Fulton Corp.*:

> In its negative aspect, the Commerce Clause "prohibits economic protectionism – that is 'regulatory measures designed to benefit instate economic interests by burdening out-of-state competitors.'"

516 U.S. at 330 (quoting *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *New Energy*, 486 U.S. at 273-74)). A classic example of such a protectionist burden is that struck down in *Boston Stock Exchange*—a transaction tax which increased when part of the targeted transaction, the sale of a share of stock, occurred outside the taxing State in interstate commerce. 429 U.S. 318 (1977). As the Court noted, the effect of such taxes, if replicated nationally, would be to make interstate trade artificially expensive and thereby hinder trade among the States—to "'invite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects." *Id.* at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

The economic effect of intra-state incentives like the Ohio investment tax credit is entirely different. A credit or subsidy awarded to in-state companies merely reduces the cost of doing business in a given State. Replicated nationwide, such

business incentives have the primary effect, as critics of incentives have observed, of reducing businesses' aggregate tax rates. Enrich, *supra*, at 387. To the extent such laws have an incidental effect on interstate commerce, it is to promote such commerce by "driv[ing] down the level of state taxation of mobile capital to its economically optimal level." *Id.* at 401 (paraphrasing Charles E. McClure, *Tax competition: is what's good for the private goose also good for the public gander?*" 39 NAT'L TAX J. 341, 341-43 (1986)). While some academic commentators might view low business tax rates as a social problem, it is clearly a different "problem" than protectionist trade barriers—the sole problem at which the Commerce Clause is directed.

The significance of the economic distinction inherent in this Court's anti-discrimination cases is effectively illustrated by an example developed by Professor Clayton P. Gillette—the competition by law schools for qualified professors. Gillette, *supra*, at 482. As Professor Gillette notes, law schools use incentives, such as pay and benefits, to lure law professors from law schools in other States. This practice is designed to influence, and undoubtedly does influence, interstate commerce, but one "would be surprised to hear anyone claim that B State ought to be constrained by the Commerce Clause from bidding for Professor A's services." *Id.* By contrast, few would be surprised if the Commerce Clause were invoked to strike down a requirement that professors teaching in a given State be graduates of that State's law schools or pay a tax not levied on graduates of those schools. The difference lies in the effect of such policies on the national economy. Just as business incentives have an aggregate effect of creating a favorable low tax business climate, the competition to offer salaries and benefits to law professors has the effect of creating a favorable employment environment which in the aggregate benefits all

professors. By contrast, a discriminatory tax or prohibition against professors from out-of-state law schools imposes, like a tariff on goods, costs on law professors as a group, hindering their movement to the States in which they are in greatest demand and thereby impoverishing the law teaching profession and the nation. Tax incentives like Ohio's investment tax credit affect commerce in precisely the same way as a high salary offer to a law professor, a well-engineered bridge or a low aggregate corporate income tax rate – by making a State an attractive place to do business. Such government activities erect no barrier to interstate commerce, however, and have never been deemed discriminatory by this Court.

In one case, this Court specifically applied these principles to a tax incentive statute designed to make a State attractive to business investment by lowering the income taxes of in-state taxpayers and held that the incentive did not run afoul of the Commerce Clause. *See Moorman Manufacturing*, 437 U.S. 267 (1978). In *Moorman Manufacturing*, this Court evaluated Iowa's single factor income-tax apportionment scheme, which apportioned income to Iowa based on a taxpayer's in-state sales, without consideration for in-state property and payroll. *Id.* The effect of the single factor apportionment scheme is to reduce taxes on businesses with property and payroll in Iowa as compared with States using the more typical three factor apportionment formulas, which apportion tax based on in-state sales, property and payroll. This Court rejected any notion that Iowa's business-friendly tax scheme violated the Commerce Clause:

> Appellant also contends that the Iowa formula discriminates against interstate commerce in violation of the Commerce Clause and the Equal Protection Clause, because an Illinois corporation doing business in Iowa must pay tax on a greater portion of its

> income than a local Iowa company, and an Iowa company doing business in Illinois will pay tax on less of its income than an Illinois corporation doing business in Iowa. *The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa and Illinois statutes, and Iowa is not responsible for the latter.*

*Id.* at 278, n. 12 (emphasis supplied). The same logic applies to Ohio's investment tax credit, to a low corporate tax rate, or to a well-paved road. To the extent such business-friendly governmental actions attract or influence interstate commerce, it is not because they impose a discriminatory trade barrier but because they have created favorable business conditions. Should other States choose to replicate the favorable conditions, taxes or other burdens on businesses will be reduced. Should they choose not to provide equivalent business conditions, any resultant disparity will proceed from that decision, not from any discrimination inherent in one State's passage of laws designed to attract business with apportionment rules, low tax rates, or other provisions favorable to business operations.

Because this Court has never suggested that incentives which benefit businesses by simply reducing their tax burden are, by virtue of that reduction, discriminatory, the Respondents are forced to divorce the language in this Court's Commerce Clause cases from its economic context to construct support for their challenge to Ohio's investment tax credit. It is certainly true, as Respondents note, that this Court has stated that the Commerce Clause prohibits taxes which "[provide] a direct commercial advantage to local businesses" and noted that "[t]he determination of

constitutionality does not depend on whether one focuses on the benefited or the burdened party." *Bacchus Imports, Ltd. v. Director of Taxation*, 468 U.S. 263, 273 (1984). But such statements only have meaning if viewed in the context that they were made. *Bacchus* involved a tax scheme which effectively created a tariff on liquor produced outside Hawaii by exempting local producers from a generally-applicable tax. *Id.* at 273. Unsurprisingly, this Court, noting that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of ... discriminatory purpose," determined that such a scheme was protectionist and unconstitutional. *Id.* at 270. The fact that the scheme was structured as a "benefit"—an exception from tax effectively available only to local producers—did not make it any less a trade barrier. *Id.* at 271.

By separating *Bacchus* from its economic context—from the plainly protectionist effect of the tariff effectively created by Hawaii's liquor tax scheme—the court of appeals has abandoned this Court's Commerce Clause jurisprudence for an unworkable rule of law that has no discernible or justifiable limits. If, in fact, any law which provides a "benefit" to businesses and thereby attracts investment to a State violates the Commerce Clause, then virtually any tax credit, subsidy, low tax rate, business friendly apportionment scheme, or, for that matter, road, convention center or other investment designed to make a State attractive to business violates the Constitution. The court of appeals' concern that "the economic effect of the Ohio tax credit is to encourage further investment in-state at the expense of development in other states" would apply with equal force to any of these activities. *Cuno*, 386 F.3d at 745. Such a standard would run directly contrary to this Court's holding in *Moorman Manufacturing*. More fundamentally, it would defy common sense and detach this Court's Commerce Clause

jurisprudence from its longstanding economic moorings. Having created a body of case law which establishes an economically meaningful standard for discerning unconstitutional protectionist legislation, this Court should reject the court of appeals' unprincipled departure from that standard.

### B. The court of appeals' holding departs from the original purpose of the Commerce Clause.

In distinguishing between unlawful trade barriers and lawful intra-state incentives, this Court has carried out the intent of the Framers. As this Court has observed, striking down protectionist tariffs

> effectuates the Framers' purpose to 'prevent a State from ... jeopardizing the welfare of the Nation as a whole, as it would do *if it were free to place burdens on the flow of commerce across its borders* that commerce wholly within those borders would not bear.'

*Fulton Corp.*, 516 U.S. at 330 (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)) (emphasis supplied). The central purpose of the Commerce Clause was to eliminate such "burdens on the flow of commerce," which had plagued the States under the Articles of Confederation. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th Ed. 1991) (emphasizing that "[t]he national Commerce Power, it was hoped, would put an end to ... protective tariffs on imports from other states"). As James Madison observed:

> [t]he defect of power in the existing Confederacy to regulate the commerce between its several members is ... clearly pointed out by experience. ... *A very material object of [the power to regulate foreign commerce] was the relief of the States which import*

> *and export through other States, from the improper contribution levied upon them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.*

THE FEDERALIST No. 42 (James Madison) (emphasis supplied). This Court's application of the Commerce Clause's anti-discrimination principle thus addresses the particular economic problem that Madison and the other authors of the Constitution designed that Clause to solve. The court of appeals' interpretation of the Commerce Clause strains to address a very different issue—the reduction and elimination of taxes on businesses. While whether reducing taxes on business through incentives of the sort at issue is wise public policy may be open to debate in the legislative context, low taxes on business were simply not an issue that concerned the Framers. Accordingly, it has no relevance to the issue in this case.

### C. The court of appeals' holding necessitates a formalistic distinction between credits and subsidies.

The court of appeals' analysis necessarily requires this Court to abandon its focus on the economic substance of challenged legislation and adopt a formalistic distinction between subsidies and other, equivalent economic development incentives such as tax credits. This Court has long recognized "that direct subsidization of domestic industry does not ordinarily run afoul of the negative Commerce Clause." *West Lynn Creamery v. Harris*, 512 U.S. 186, 199, n. 15 (1994) (quoting *New Energy*, 486 U.S.

at 278); *see also*, *Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (noting that a town could avoid a burden on interstate commerce by directly subsidizing a private solid waste operation). In striking down Ohio's investment tax credit, the court of appeals concedes that "a direct subsidy ... would no doubt have the same economic effect" as the challenged credit. *Cuno*, 386 F.3d at 746. This is consistent with the analysis offered by Professor Hellerstein in the law review article cited by the court of appeals, in which he notes that "[e]conomists know that the real-world impact of such a subsidy mirrors the effect of the credit." Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 835 (May 1996). The court of appeals offers no legally coherent basis for distinguishing economically equivalent subsidies and credits other than the conclusory statement that "the distinction ... results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax"—in other words, taxes and subsidies are different because taxes are taxes and subsidies are subsidies. *Cuno*, 386 F.3d at 746.

The court of appeals' approach is a complete departure from this Court's historic application of the Commerce Clause, which "eschew[s] such formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery*, 512 U.S. at 201. True to that approach, this Court has never endorsed an artificial rule that subsidies are a distinct class of incentives that are excluded from scrutiny under the Commerce Clause. To the contrary, where subsidies have been used as part of a scheme designed to erect a trade barrier to interstate commerce by allowing in-state taxpayers to evade a facially neutral tax, this Court has not hesitated to strike down such schemes. *See West Lynn Creamery*, 512 U.S. 186 (1994). As this Court observed in

*New Energy*, subsidies that pass constitutional muster do so, not because of some special Commerce Clause doctrine applicable to subsidies, but because subsidies, by their nature, "are not generally 'connected with the State's regulation of interstate commerce.'" *Cuno*, 386 F.3d at 746 (quoting *New Energy*, 486 U.S. at 278). As Justice Stevens has observed, the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry"—a principle that is not dependent on the form of method chosen; "*[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital*, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J. concurring) (emphasis supplied). This Court's treatment of subsidies is simply an expression of the Commerce Clause principles that inform its analysis of other incentives; protectionist tariff barriers are prohibited while statutes which simply lower the cost of doing business within a taxing State generally pass muster.

Commentators cited by the court of appeals have suggested that tax credits should be distinguished from subsidies because unlike subsidies they do not have to be budgeted and are therefore subject to less political scrutiny. *See, e.g.*, Hellerstein and Coenen, *supra*, at 847. Whatever the significance of this purported distinction from a public policy standpoint, it has nothing to do with the proper application of the Commerce Clause. "It is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1998). To the extent that citizens of a State become concerned that their legislators enact tax credits too readily, they can effectively address that problem through the political process.

## III. AS IN *QUILL CORP. V. NORTH DAKOTA*, THIS COURT SHOULD DEFER TO CONGRESS THE COMMERCE CLAUSE PUBLIC POLICY ISSUES ARISING OUT OF STATE AND LOCAL BUSINESS TAX INCENTIVES.

This Court should take into consideration the "substantial reliance" by countless industry and public officials on longstanding tax incentives and properly "leave essentially legislative judgments to the Congress" regarding the benefits and burdens on interstate commerce created by such incentives. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897-898 (1988) (Scalia, J., concurring in Judgment). This Court could follow the fair and prudent course set by it in *Quill*, 504 U.S. at 298. In *Quill*, this Court was called upon to address whether the Due Process Clause and Commerce Clause prohibit States from taxing out-of-state mail-order vendors. *Id.* The Court reversed its earlier precedent with respect to the Due Process issue, but, noting that existing precedents had "engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry," the Court declined to reverse its longstanding Commerce Clause position that mail-order businesses could not be taxed by States in which they had no substantial physical presence. *Id.* at 317. Important to this Court's determination was the recognition that

> [t]his aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

*Id.* at 318. Would it therefore not be better that this Court similarly consider the reliance interests of manufacturers who have invested substantial sums induced to do so by significant tax incentives and hold that incentives of the sort at issue do not run afoul of the Dormant Commerce Clause?

Certainly, the reliance interests implicated in this case are far weightier than those protected by this Court in *Quill*. *Quill* involved a single industry; the court of appeals' decision in this case calls into question a vast framework of incentives relied on by manufacturers operating in virtually every State in the Union. *See* Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997).

As in *Quill*, this Court should reverse on substantive grounds the court of appeals, reinstate the district court decision, and leave to Congress the task of balancing these extensive reliance interests, as well as the significant economic benefits that have motivated State legislatures to adopt the incentives on which industries now rely, against the anti-tax incentive policy agenda advocated by the Respondents. While this case does not involve a question of law to which this Court has directly spoken as did *Quill*, it does involve an issue as to which informed taxpayers could have reasonably inferred from this Court's precedents that tax incentives such as those at issue were well within acceptable limits set under the Commerce Clause, and made informed investment decisions in reliance on those references. The Respondents concede that this Court's Dormant Commerce Clause jurisprudence does not directly mandate the court of appeals' decision to strike down the most commonly available type of business tax incentive in the United States. *See* Walter Hellerstein, *supra*, at 805. Indeed, the Respondents themselves characterize their position as a "novel legal

theory." (No. 01-3960, *Cuno v. DaimlerChrysler Corp.* (6th Cir.), Pl. Br. at viii).

This Court has recognized that "novel legal theor[ies]" of State taxation with broad national application are best tested, evaluated and promulgated by Congress. *Quill*, 504 U.S. at 318 (refusing to adopt an "economic" rather than "physical" presence Commerce Clause nexus requirement); *Moorman Manufacturing*, 437 U.S. at 278-280 (refusing to mandate a formula for apportionment of income of multi-state enterprises on the grounds that such action would necessitate "extensive judicial lawmaking"); *see also*, *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 620 (Thomas, J., dissenting) ("the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce ... and leaves to Congress the policy choices necessary for any further regulation of interstate commerce"). As in *Quill* and *Moorman*, this Court should decline Respondents' invitation to impose such a novel legal theory on the States by judicial fiat and thereby avoid opening the Pandora's Box of when and to what extent application of the novel theory must, cannot, should, or should not be given retrospective effect. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *see also*, HARTMAN AND TROST, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2D, § 7.5, pp. 64-104 (2003) (analyzing cases addressing the validity of claims for retroactive relief in tax cases).

Business development incentives are an area of law particularly suited to Congressional action. Unlike this Court, which must address the issue from the narrow perspective of the specific facts and statute at issue, Congress can create a national scheme which broadly addresses such incentives in the totality of their various iterations and circumstances,

either by allowing them, or banning them entirely, or placing all or certain types of incentives in protected safe harbors.[3] Not only would such a Congressionally mandated scheme place States in all Circuits on an equal footing, but it would immediately increase the value of those incentives to both the States and the businesses that rely on them by eliminating the legal uncertainty created by the decision of the court of appeals. Congress is also in a unique position to address the interests of those businesses that have made substantial investments in reliance on such incentives, often after evaluating opportunities in many competing States and nations. To the extent Congress agrees with the Respondents that, irrespective of the opinion of legislatures throughout the United States, certain incentives are bad public policy and place an unreasonable burden on interstate commerce, it can readily enact "grandfather" or "sunset" provisions carefully tailored to preserve tax benefits for which businesses have already bargained in good faith.

A decision of this Court reversing the holding of the court of appeals on the ground that the Dormant Commerce Clause does not prohibit the incentive at issue will leave Congress, should it so choose, free to form a national policy on business development incentives. As this Court observed in *Quill*, "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that 'the better part of wisdom and valor is to respect the judgment of the other branches of the Government.'" *Quill*, 504 U.S. at 318-319 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637-638 (1992)).

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[3] A bill has been introduced in Congress to protect commonly used incentives, including credits for in-state investment of the sort challenged in this litigation, from Commerce Clause challenge. S. 2881, 109th Cong., 1st Sess. (2005).

## CONCLUSION

For the foregoing reasons, and those set out in the briefs of Petitioners, this Court should reverse the court of appeals.

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Nos. 04-1704 and 04-1724

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IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
*Petitioner*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

WILLIAM W. WILKINS, *et. al.*,
*Petitioners*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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## BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

## INTRODUCTORY STATEMENT

This brief is submitted by the Counsel On State Taxation and the National Association of Manufacturers as *amici curiae* in support of the Petitioners in the above captioned matter.[1]

[1] No Counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members or counsel has made a monetary contribution to the preparation or submission of this

## STATEMENT OF INTEREST OF *AMICI CURIAE*

COST is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. Many of the 45 states that impose a form of corporate income tax also incorporate some form of investment tax credit—the concept at issue in this case—or similar incentive and many COST members have utilized investment tax credits from one time to another. Thus, COST members have a financial interest in whether the investment tax credits are valid.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The members of NAM thus also have a financial interest in whether the investment tax credits are valid.

## ARGUMENT

The constitutional analysis adopted by the Sixth Circuit in invalidating the investment tax credit offered by the state of Ohio to DaimlerChrysler is flawed because it needlessly broadens the scope of the dormant Commerce Clause's limitations on states' authority to implement discrete tax systems based on each state's unique economy and populace.

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brief. Petitioners and Respondents have consented to the filing of this brief and their letters have been filed with the Clerk of this Court.

As a result of this flawed interpretation of the dormant Commerce Clause, the Sixth Circuit's analysis and holding create an impossible standard for determining whether a tax system imposes an unconstitutional burden on interstate commerce by impermissibly discriminating against interstate commerce. The Sixth Circuit's standard is impossible to actually implement because under the central premise of the Sixth Circuit's reasoning all state taxes that vary from state to state discriminate against interstate commerce. Such a result is clearly not the intent of the Constitution of the United States and its federalism underpinnings.

The Sixth Circuit commits two interrelated errors in finding the investment tax credit at issue discriminates against interstate commerce. First, the court should have chosen a narrower rule defining when a tax system is discriminatory that reconciled and acknowledged existing precedent of this Court while at the same time limiting the scope of state tax systems that would fail the rule. Second, by drastically expanding the scope of the dormant Commerce Clause's limitations on the states, the Sixth Circuit robs the states of a unique and highly cherished element of the governing theory of the United States—the co-equal status of the states and the federal government. The Sixth Circuit's decision effectively destroys *any* autonomy of the states to choose individualized systems of taxation. While the dormant Commerce Clause exists and is necessary to control the worst aspects of state imposed domestic protectionism through the tax code, the states' loss of all control over all aspects of state fiscal fundraising, as would ultimately be the result of the Sixth Circuit's underlying rationale, is fundamentally contrary to our system of government and leaves the states as merely emasculated administrative arms of the federal government and the courts.

## I. THE SIXTH CIRCUIT COURT OF APPEALS CHOSE THE WRONG STANDARD FOR DETERMINING WHETHER A TAX SYSTEM DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The Sixth Circuit applied an unnecessarily overbroad interpretation of the standard under the discrimination prong of the dormant Commerce Clause in finding that the Ohio investment tax credit was unconstitutional. The Sixth Circuit chose to use as the standard the question of whether a tax system prevents "tax-neutral decision making." *Boston Stock Exchange et. al. v. State Tax Commission*, 429 U.S. 318 at 330 (1977). While this language does appear in this Court's historical decisions involving incentives and discrimination against interstate commerce, the language is not reconcilable with business operations and the economy and is not at the heart of any of this Court's decisions in the area.

First, nearly every business decision is premised on tax considerations and it would be irresponsible for taxpayers to ignore tax provisions in evaluating alternatives. Common economic theory posits that all taxes distort activity and the goal of an efficient tax system is to limit such distortions. A classic example is an individual's choice whether to rent a house or to buy a house. All other things being equal (payments, type of house), an individual will choose to buy a house rather than rent because the interest payments on the mortgage are deductible while no part of rental payments are—thus lowering the net cost of buying relative to renting. This is distortive because if the tax results were the same for buying and renting, the individual might have chosen not to use the available credit to buy a house, but instead would have chosen to rent and use the credit to start a dry cleaning business. In a tax neutral world, the dry cleaning business would be a better investment, but once taxes enter the picture the best use of resources is no longer the chosen route because of the tax consequences. There are thousands of

similar examples as to how taxes by nature distort economic choices—retiring to Florida (no income tax), financing a new business with debt instead of equity (interest is deductible, dividends are not), etc. Thus, if the constitutionality of state tax systems were to start with this issue of whether such a system forecloses tax neutral decision making, no tax would pass this threshold hurdle.

Second, not only did the Sixth Circuit latch on to an overly broad standard, but it did so unnecessarily. It is a common rule of statutory construction that courts should choose the narrower rule that upholds the validity of a statute. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"). Because a narrower rule is available in this case, the Sixth Circuit failed to adopt the appropriate rule and, thus, this Court should reverse the decision of the Sixth Circuit Court of Appeals and find that the investment tax credit at issue is constitutional.

The Sixth Circuit in this case adopted a very broad standard for applying the discrimination prong of the dormant Commerce Clause. The rule imposed by the Sixth Circuit is that any incentive that affects a taxpayer's decision is per se invalid. This rule is both over-broad (it would sweep in legislative choices such as the corporate tax rate and the type of corporate income tax apportionment formula used to determine state taxable income) and unnecessary in light of existing precedent. The rule that should be applied in determining the constitutionality of a state or local tax incentive under the discrimination prong of the Commerce Clause in the United States Constitution is: *Does the incentive for in-state activity penalize activities occurring in another state?* It is only if the answer to this question is "yes" that the incentive violates the discrimination prong of the U.S. Constitution (hereafter "the Narrow Rule"). This is the rule that

emerges from a careful reading of existing U.S. Supreme Court precedent, and which narrowly proscribes the legislative enactments that could violate such a rule. In the following discussion, each of the cases relied on by the Sixth Circuit in reaching its decision in this case is analyzed in the context of this Narrow Rule to verify consistency. Following that analysis, the investment tax credit that the court ruled unconstitutional is also subjected to this suggested rule. Under the Narrow Rule, the Ohio incentive is in fact constitutional.

The Narrow Rule is applied using four successive steps: first the activity being taxed is defined; second, the taxed activity is assumed to stay at the same level in the taxing state; third, activity in another state is increased; finally, if this increase in activity in another state results in an increase in tax in the taxing state, the tax is unconstitutional. The cases relied on by the Sixth Circuit and the primary United States Supreme Court cases involving Commerce Clause challenges to state tax incentives[1] as discriminating against interstate commerce are: *Westinghouse Electric v. Tully*, 466 U.S. 388 (1983), *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), *Bacchus Imports v. Director of Taxation*, 468 U.S. 263 (1984), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). In each of these cases this Court found the incentive was unconstitutional because it discriminated against interstate commerce. Applying the Narrow Rule as described above results in the same holding in each of these cases but a different result for the case at issue.

In *Westinghouse Electric*[2] the issue was whether a credit against the New York franchise tax for exports from New

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[2] *Westinghouse Electric* is the case most similar to the case at hand because it also involved a credit to a corporate franchise tax based on in-state activity.

York was unconstitutional. The credit was determined first based on the ratio of New York exports to nationwide exports and second by the ratio of New York property, payroll and sales to nationwide property, payroll, and sales. Applying the Narrow Rule—first, the activity taxed in this case was business activity including export sales. Second, the overall business activity, including export sales, in New York is assumed to stay exactly the same. Third, the taxpayer increases its nationwide business activity by adding more export sales in another state. The result is that by increasing non-New York exports but holding New York business activity including export sales exactly the same, the New York export credit is reduced and the New York franchise tax is increased. This occurs because the New York credit is not based on an absolute number related exclusively to New York export activity, but instead varies based on the percentage of the overall national export and business activity market that New York shares.

In *West Lynn Creamery*, the issue was whether a "premium" charged by Massachusetts for milk sales that was used to subsidize in-state milk producers violated the Commerce Clause. The net result of this premium subsidy system was that out-of-state producers selling into the state paid a tax to which in-state producers were not subject. Applying the Narrow Rule, first, the activity taxed was milk sales. Second, the Rule assumes that a taxpayer's sales of milk in Massachusetts remain the same. Third, the taxpayer moves its in-state production facilities to another state. Fourth, the result is that the taxpayer will continue paying the same milk sale premium but will no longer receive the subsidy—the net effect is an increase in tax. Applying the Narrow Rule shows that this tax/subsidy system is unconstitutional.

In *Bacchus Imports*, the issue involved Hawaii imposing an alcohol wholesale excise tax but exempting from that tax the sales of certain types of wines produced only in Hawaii.

Application of the Narrow Rule finds this incentive to be invalid. First, the activity taxed is the sale of alcohol. Second, the total sales of alcohol in Hawaii are assumed to remain exactly the same. Third, the number of sales of non-Hawaii wines increases. The result is that the alcohol excise tax in Hawaii increases even though the total number of Hawaii alcohol sales stayed exactly the same.

In *Maryland v. Louisiana*, the issue was whether a tax by Louisiana on the use of natural gas in the state was discriminatory. An exemption from the use tax was provided for those users of natural gas in certain manufacturing businesses, including manufacturing fertilizer or producing oil, as long as the exempted activity took place within the state.[3] Applying the Narrow Rule—first, the activity taxed was the use of natural gas in Louisiana. Second, the in-state use—first using natural gas in the state—is assumed to stay exactly the same. Third, a taxpayer switches exempt manufacturing activity from in-state to out-of-state. This increase in out-of-state activity while leaving constant the in-state taxed activity increases the in-state use tax because the taxpayer no longer qualifies for an exemption. Thus, the tax scheme is unconstitutional.

Finally, in *Boston Stock Exchange*, New York State imposed an excise tax on the transfer of securities in the state. However, a credit was given against this tax if the transfer involved an in-state sale of those securities. A taxed transfer included any change in ownership through a sale, registration sale, redemption, etc. Applying the Narrow Rule, the activity taxed is the transfer of securities. Second, the Rule requires that the number of transfers taxable in New York is assumed to stay exactly the same. Third, the taxpayer accomplishes

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[3] The tax in this case was considerably more complicated than this brief description and included a credit allowed against an in-state severance tax and a credit against other fuel related taxes.

more of those transfers through out-of-state sales. Fourth, the Rule looks to see if the out-of-state activity causes an increase in New York tax. Here, it does. As an increasing number of securities transfers involved non-New York sales, the taxpayer would be subject to the same transfer tax but receive fewer credits and thus pay a higher tax. The result is that the transfer tax credit violates the Commerce Clause.

While each of this Court's cases resulted in an unconstitutionally discriminatory tax when applying the Narrow Rule, the tax incentive at issue in this case does not. The issue in this case is an investment tax credit. This investment tax credit is awarded for certain types of investment in Ohio and is applied against the Ohio franchise tax. Applying the Narrow Rule—first, the activity taxed is business activity in Ohio. Second, the Rule assumes that the taxpayer's business activity in Ohio stays exactly the same. Third, an increase in investment in another state is postulated. Fourth, the result is that Ohio's tax will stay exactly the same, notwithstanding the increase in out-of-state activity. This occurs because the calculation of the Ohio investment credit includes no reference to out-of-state activity, which is neither incented nor disincented. Thus, unlike the cases noted above, this credit is constitutional.

## II. THE SIXTH CIRCUIT FAILED TO GIVE DUE CONSIDERATION TO THE CO-EQUAL STATUS OF THE STATES AND THE FEDERAL GOVERNMENTS AND THE NECESSITY FOR THE STATES TO CONTROL THEIR OWN FISCAL WELL-BEING.

The Sixth Circuit's adoption of a broad standard for finding state tax systems discriminate against interstate commerce, if allowed to stand, will have the ultimate effect of creating but one, completely uniform tax system throughout the 50 states and all local jurisdictions. While this would

certainly make compliance easier (and in some situations may ultimately be necessary to prevent burdening interstate commerce through compliance complexity), in general it is good for the economy and the citizens of each state to choose independently what type of tax system they will have. Without this choice, states will be left at a disadvantage in attracting the types of jobs and industry necessary for the state and its citizens to thrive.

The United States is a large and diverse country. Each state has unique advantages and disadvantages that contribute to its overall economy and success. The differences among the states include geographic, population, and historical growth patterns, etc. Some states, like Florida and California, are blessed with nice weather and lovely beaches. Other states, like Ohio, get sleet. Some states, like Texas and Alaska, have valuable natural resources (oil) that they can exploit financially. Other states, like Ohio, do not. It is this variety in economies, natural resources, and population that create unique burdens and opportunities for each state financially. Part of this financial burden *or* opportunity lies within the choices a state's elected officials make with regard to the tax code.

Perhaps all people and businesses would move to Florida if they could. However, that would be bad for Ohio and bad for our country as a whole as it would put pressure on Florida's existing infrastructure while wasting the land and existing infrastructure of Ohio. Thus, Ohio, among other things, can choose to use its tax code to compete with Florida's beaches. Florida may have sand—but Ohio has valuable investment tax credits.

Similarly, each state may have different needs as far as the type of jobs its citizens are qualified for. Some states, due to historical patterns, may have an unskilled workforce. Such a state may want to attract either businesses that will employ unskilled laborers or provide on-the job training to increase

the skill level. Other states may have an extremely technically advanced population and would find little use in low-skilled jobs. By allowing each state to tailor its tax system to meet the needs of its populace, our federalist system allocates precious resources across the states based on the uniqueness of that state. The perfect tax system for Florida may not be the perfect (or even possible) tax system for Ohio. The Sixth Circuit's decision however, essentially finds that such unique tailoring on a state by state basis is discriminatory because it could foreclose tax neutral decisions.

Taking the Sixth Circuit's reasoning at face value, many common tax systems, not just the incentives at issue here, would clearly be unconstitutional. For example, several states over the years have chosen to move from apportioning the income of a multistate corporate taxpayer based on the percentage of that taxpayer's property, payroll and sales in the taxing state to only using a single factor—sales—to determine the percentage of income taxable in this state. Many businesses, when considering a new facility location, may find such an apportionment formula attractive because it does not increase the business's tax when it adds a facility and payroll in the state. However, such "tax influenced" decision-making would doom alternatives to the three factor system and ultimately require that all states adopt identical apportionment formulas. The same thing can be said for differences in tax rates (some businesses may choose to locate in states with lower statutory rates) and differences in taxes themselves (some businesses may be attracted to Nevada because it does not impose a corporate income tax). Tax rates, tax types, apportionment formulas, and even what goes into the tax base vary drastically among the states. Under the Sixth Circuit's reasoning, if taxpayers' were to take into account these variations, then all variations would be unconstitutional.

Hence, in order to preserve any type of federalism and state autonomy over the fisc, the Sixth Circuit's sweeping en-

dorsement of the "tax-neutral decision making" theory must be abandoned. Once its limitless scope and the ultimate result of a homogenized state tax system is understood, the Sixth Circuit's rationale falls of its own weight.

## CONCLUSION

Because the Sixth Circuit could have chosen a narrower rule in determining whether the Ohio investment tax credit unconstitutionally discriminated against interstate commerce and such a rule would both be consistent with this Court's precedent and would uphold the incentive at issue in this case and similar incentives in the other 45 states imposing a corporate income tax, COST and NAM ask this court to reverse the decision of the Sixth Circuit and hold the Ohio investment tax credits are constitutional.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

DAIMLER CHRYSLER CORP.,

*Petitioner,*

*v.*

CHARLOTTE CUNO, *et al.*,

*Respondents.*

WILLIAM W. WILKINS,
TAX COMMISSIONER FOR THE STATE OF OHIO, *et al.*,

*Petitioners,*

*v.*

CHARLOTTE CUNO, *et al.*,

*Respondents.*

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF *AMICI CURIAE* DIRECTV, INC. AND ECHOSTAR SATELLITE L.L.C. IN SUPPORT OF NONE OF THE PARTIES

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## INTEREST OF THE *AMICI CURIAE*[1]

DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite L.L.C. ("EchoStar") are the nation's leading satellite television providers. DIRECTV and EchoStar deliver a variety of television programming packages—including hundreds of channels such as CNN, C-SPAN, Discovery, ESPN, HBO, MTV, Showtime, and broadcast stations of the ABC, CBS, Fox, and NBC networks—to their customers by transmitting signals from satellites in orbit above the Earth to satellite dishes mounted on subscribers' homes or businesses. Together, EchoStar and DIRECTV serve more than 26 million subscribers, in every state across the United States.

The central issue to be decided in these cases is whether the dormant Commerce Clause prohibits state and local tax credits designed to attract in-state investment. *Amici* are concerned that, if this issue were to be decided in a manner that is not limited to the facts of these cases, the decision could potentially influence pending Commerce Clause actions *amici* have brought challenging state tax credits and exemptions that are not intended to attract in-state investment, but are classic examples of unconstitutional protectionism.

Since 2002, five states have enacted laws that tax direct broadcast satellite ("DBS") service provided by satellite

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1. In letters lodged with the clerk, the parties have granted blanket consent for the filing of *amicus curiae* briefs. This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity other than the *amici curiae* made a monetary contribution for preparation of this brief.

operators such as DIRECTV and EchoStar, but that, in one form or another, effectively exempt from taxation DBS's fiercest competitors, cable companies who use local cable networks to deliver their service. For example, Ohio adopted a law that taxes the retail sale of DBS television service at 6 percent, but that totally exempts competing cable television service. *See* Ohio Rev. Code §§ 5739.01(B)(3)(q), 5739.01(XX), 5739.02(A)(34), 5741.02. Just this year, North Carolina also adopted a measure that imposes a nominally equal sales tax on both DBS and cable, but that then grants cable companies a credit for the amount of franchise fees they pay to local governments for the use of local rights-of-way. *See* N.C. Session Law 2005-276 §§ 33.4(a), 33.14, *amending* N.C.G.S. 105-164.4(a), *adding new* N.C.G.S. § 105-164.21B.

DIRECTV and EchoStar are challenging the Ohio and North Carolina tax exemptions and credits, as well as similar exemptions and credits in Florida, Kentucky, and Tennessee.[2] These credits and exemptions are classic examples of protectionist discrimination against interstate commerce: They are available only to multi-channel television operators who provide service using in-state cable networks, and are denied to competing satellite television providers who deliver

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2. *See DIRECTV, Inc. v. Florida Dep't of Rev.*, No. 05-CA-1037 (Fla. Cir. Ct., 2nd Judicial Cir., Leon County); *DIRECTV, Inc. v. Treesh*, No. 05-CV-24-KKC (United States Dist. Ct., E.D. Ky.); *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-07135 (Ct. Common Pleas, Franklin County, Ohio); *DIRECTV, Inc. v. Tolson*, No. 5:05-CV-7484-FL(2) (United States Dist. Ct., E.D.N.C.); *DIRECTV, Inc. v. North Carolina*, No. 03 CVS 13324 (N.C. Gen. Ct. of Justice, Sup. Ct. Div., Wake County), *on appeal*, N.C. Ct. App. No. 05-1250; *DIRECTV, Inc. v. Chumley*, No. 03-2408-II (Tenn. Chancery Ct. of Davidson County, 20th Judicial Dist.).

their programming using satellites that are necessarily located out-of-state. As a court in one of these cases held, "Reasonable minds can reach but one conclusion that the differential tax treatment burdens out-of-state economic interests and favors in-state economic interests." *See* Decision and Entry Partially Granting Plaintiffs' Motion for Summary Judgment, *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-7135, slip op. at 15 (Oct. 21, 2005).

DIRECTV and EchoStar have an interest in the cases now before this Court because of their potential effect on *amici's* pending cases. There are significant differences between the Ohio investment tax credit at issue here and the cable television tax credits and exemptions that discriminate against DIRECTV and EchoStar. Among other things, the cable tax credits and exemptions are not intended to attract investment in plant or equipment inside the state but, rather, to offset the cost of the franchise fees cable companies pay to local governments for the use of local rights-of-way. The credits are plainly not an evenhanded attempt to attract investment into the state because satellite operators cannot relocate their satellites from orbit above the Earth into the taxing state. In addition, unlike Ohio's investment tax credit, the state cable credits and exemptions bear the earmarks of classic protectionist taxes that this Court has long condemned—the imposition of a tariff-like barrier to the purchase of products and services from out-of-state sources. Nevertheless, since this Court is considering the constitutionality of state tax credits under the Commerce Clause for the first time since *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988), it is possible that the decision in these cases, if not carefully circumscribed, may be construed expansively and affect the lower courts' consideration of *amici*'s pending challenges to the cable television credits and exemptions.

DIRECTV and EchoStar neither seek affirmance nor support reversal of the Sixth Circuit's decision. Rather, *amici* wish to provide their views on the distinctions between different types of tax credits, and the implications of these differences for Commerce Clause analysis. This will assist the Court in rendering a decision on the investment tax credits at issue here that will be appropriately limited to the type of investment credits involved in these cases, without altering established jurisprudence governing protectionist tax credit schemes.

## SUMMARY OF ARGUMENT

Investment credits differ from traditional discriminatory taxes. Tax credits and exemptions previously found invalid by the Court clearly impact interstate commerce. They directly change the price of ***transactions***. But investment tax credits affect interstate commerce more circuitously. They merely affect the value of a single ***cost input*** into the product or service being sold. Thus, investment tax credits may require a closer scrutiny in order to determine whether their effects rise to the level of impermissible discrimination against interstate commerce.

The first step in assessing a state investment tax incentive is to determine whether the measure is genuinely intended to attract in-state investment. Incentivizing in-state investment pursues the legitimate state purpose of "encourag[ing] the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). However, the mere characterization of a tax incentive as intended to attract investment should not be controlling for Commerce Clause purposes. This Court regularly has probed into the actual

purpose behind state taxes and rejected the stated justification if it was a pretext for protectionism.

If a state tax is genuinely intended to attract in-state investment, the next step in Commerce Clause analysis is whether the state is pursuing this legitimate interest by means that do not discriminate against interstate commerce. Tax incentives violate the Commerce Clause when they have the same economic effect as a "protective tariff or customs duty." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). Investment incentives that take the form of credits from sales taxes or similar transactional taxes operate as such a tariff barrier. They directly discriminate against interstate commerce by increasing the cost of sales to consumers who purchase goods or services from out-of-state vendors. Conversely, credits for investment, such as the Ohio credit in issue in these cases, do not directly affect the sales price of the transaction, and thus may not have an invidious impact on interstate commerce.

## ARGUMENT

### I. TAX CREDITS AND EXEMPTIONS SHOULD FIRST BE SCRUTINIZED TO DETERMINE IF THERE IS A GENUINE INTENT TO ATTRACT IN-STATE INVESTMENT

This Court repeatedly has emphasized that "finding [whether] state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citations omitted). Thus, one of the factors almost always considered by the Court in tax credit cases is whether the state interest

that underlies the credit is protectionist or legitimate. *See, e.g., id.* at 272-73; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39 (1980); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352 (1976).

In the case of investment tax credits, the purpose of "encourag[ing] the growth and development of intrastate commerce and industry" has long been considered a legitimate one, because competition "for a share of interstate commerce . . . lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 336-37. Conversely, a state interest in protecting local industry from out-of-state competition is never legitimate. Indeed, that is precisely the type of protectionism the dormant Commerce Clause was designed to prevent. *See, e.g., Bacchus*, 468 U.S. at 272; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

Thus, the first step in Commerce Clause analysis of a state incentive scheme is to determine whether it is genuinely intended to promote in-state investment or is a pretext for protectionism. In making this inquiry, the Court has not deferred to the legislature's characterization of its rationale but has instead probed into the actual purpose behind the challenged law where it has a differential impact on in-state and out-of-state economic activity. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses."). "Formulas and catchwords" thus are not controlling in determining the law's actual purpose. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). The Court accordingly has rejected the "official" rationale for a challenged law where it was a pretext for protectionism. *See, e.g., New Energy Co.*, 486 U.S. at 279-

80 (rejecting health justification for a law whose actual purpose was to protect local producers of ethanol from out-of-state competition); *Kassel*, 450 U.S. at 676-79 (rejecting highway safety rationale because evidence indicated the actual purpose was to discourage interstate truck traffic).

In these cases, there is no dispute that the Ohio investment tax credit was genuinely designed to attract in-state investment, as opposed to protecting in-state commerce from out-of-state competition.

## II. TAX CREDITS AND EXEMPTIONS DESIGNED TO ATTRACT IN-STATE INVESTMENT MUST DO SO BY MEANS THAT DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The fact that a tax credit or exemption is genuinely intended to attract in-state investment does not shield it from further constitutional scrutiny. Although a state may compete with others "for a share of interstate commerce . . . , in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exch.*, 429 U.S. at 336-37; *see also Bacchus*, 468 U.S. at 271 (in "encouraging domestic industry, . . . the Commerce Clause stands as a limitation on the means by which a state can constitutionally seek to achieve that goal"). Thus, the second step in Commerce Clause scrutiny of investment incentives is to determine whether the ***means***, not just the ***end***, comport with the Commerce Clause.

In creating tax incentives for in-state investment, there is an important difference between exemptions or credits granted against transactional taxes, such as a sales tax, and

for investments, as in the cases at bar. A discriminatory tax on a commercial ***transaction*** directly modifies the ***price*** of the product or service being sold. The tax makes interstate goods more expensive in comparison to competing intrastate goods by directly increasing the price of the interstate good or, when a credit is given, through the equivalent economic effect of reducing the price of the intrastate good or service.

But an ***investment*** credit against an income tax does not necessarily shift the price of the product or service in a significant way. Rather, the charge for an investment is a ***cost input*** that is merely one component of the end price ultimately charged to consumers, and the credit affects only that input cost.

The attenuated impact of income tax credits is demonstrated by the facts of the Ohio measure in question here. Daimler Chrysler and other automobile manufacturers compete in a nationwide market for cars and car parts. Because the Ohio credit is not tethered to any specific sales transaction, and its economic effects are spread across the entirety of Daimler Chrysler's business operations, the tax credit does not translate into a direct competitive advantage for Daimler Chrysler either in Ohio or nationwide. Indeed, if every state adopted an investment tax credit equivalent to Ohio's, there would be no impact on interstate commerce at all. This is, in part, why numerous studies have determined that investment incentives often do not have a measurable impact on companies' decisions where to locate their facilities.[3]

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3. *See, e.g.*, Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 479 (1997); Peter D. Enrich, *Saving the States from Themselves:*

(Cont'd)

The effect on interstate commerce is further attenuated by who it affects. If a manufacturer pays reduced corporate income taxes in Ohio for new investments in that state, the other corporations who end up paying relatively higher Ohio income taxes will include both Ohio and foreign corporations—and both businesses that sell predominantly in the interstate market and those that cater to an exclusively Ohioan clientele. As a result, the ultimate economic impact of the Ohio tax credit is not necessarily to "provid[e] a direct commercial advantage to local business." *Boston Stock Exch.*, 429 U.S. at 329 (*citing Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).[4]

In contrast, credits against transactional taxes (such as sales taxes) do directly favor economic activity performed in the state over out-of-state economic activity. The company making an investment within the state receives a localized

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(Cont'd)

*Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 383-86, 397-98 (1996); Ivan C. Dale, Comment, *Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247, 247 (2002).

4. Thus, Ohio's investment incentive does not have the "coercive" effect that commentators have identified of "not only" funneling an intrastate activity into Ohio, "but, in addition," encouraging the "corporation [to] conduct its business in [the state]." Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413, 440 n.123 (1997). Rather, because the investment targeted by Ohio law *can only occur locally*, the Ohio law "merely lowers the cost of doing business in intrastate commerce." *Id.* It does not "discourage . . . corporations from plying their trades in interstate commerce." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996).

cost advantage in retail sales over its out-of-state rivals. The effect is precisely the same as the "paradigmatic example" of a discriminatory law—"the protective tariff or customs duty" that penalizes out-of-state activity by "tax[ing] goods imported from other States, but . . . not tax[ing] similar products produced in State." *West Lynn Creamery*, 512 U.S. at 193. Such tariff-like taxes have the most serious distorting effects on free markets, because they directly eliminate the cost advantages of more efficient out-of-state sellers. *See, e.g., id.* at 194. Thus, credits against sales or other transactional taxes violate a cardinal rule of Commerce Clause jurisprudence—that "'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *American Trucking Ass'ns v. Schneiner*, 483 U.S. 266, 280 (1987) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)).

The tax credits and exemptions granted to cable television companies are a classic example of this "rampart of customs duties." *Baldwin v. G.A.F. Seelig*, 294 U.S. at 527. Cable providers distribute television programming directly to their customers by means of in-state cable networks laid along local rights-of-way, for which they are required to pay franchise fees to local governments. Their tax credits and exemptions reflect this in-state presence requiring cable companies to obtain franchises from local governments in order to access public rights-of-way. By comparison, satellite television distributors do not need access to local rights-of-way, because they transmit television signals directly from the satellite to the consumer's residence. Accordingly, they do not obtain local franchises and do not pay franchise fees. The effect of the cable tax credit or exemption is to eliminate this cost advantage of satellite television operators. State tax laws that compensate local businesses for their cost

disadvantages by imposing higher taxes on out-of-state rivals are a classic form of prohibited protectionism. *See, e.g.*, *Bacchus Imports*, 468 U.S. at 272; *West Lynn Creamery*, 512 U.S. at 194.

## CONCLUSION

There should be a two-step analysis of state tax credits or exemptions justified as designed to attract in-state investment. First, a tax must genuinely have been intended to attract in-state investment and not to protect in-state businesses or economic activity from out-of-state competition. Second, a state may not seek to attract local investment through the use of credits or exemptions from transactional taxes that provide a direct commercial advantage to in-state commerce.

Respectfully submitted,

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In The
# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *ET AL.*,
*Petitioners,*
v.
CHARLOTTE CUNO, *ET AL.*,
*Respondents.*

WILLIAM W. WILKINS, TAX COMM'R
FOR THE STATE OF OHIO, *ET AL.*,
*Petitioners,*
v.
CHARLOTTE CUNO, *ET AL.*,
*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF *AMICI CURIAE* ECONOMICS AND PUBLIC POLICY PROFESSORS RANDY ALBELDA, HOWARD CHERNICK, PETER FISHER, ROBERT LYNCH, THOMAS MALONEY, ANN MARKUSEN, DICK NETZER, ROBERT REICH, ANDREW RESCHOVSKY, JOHN SOLOW, KENNETH THOMAS, AND JOHN YINGER IN SUPPORT OF RESPONDENTS

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## INTERESTS OF THE *AMICI CURIAE*

*Amici* are distinguished economics and public policy scholars with long histories of academic research and public policy engagement in the field of tax policy and economic development.[1] A list of the *amici* and brief biographical information are attached in the addendum to this brief. *Amici* are interested in this matter based on their professional and public concern that state tax incentives like the Ohio investment tax credit at issue in this case produce wasteful interstate tax competitions that harm the national economy. They are filing this brief because they believe that the negative economic consequences that stem from tax incentives weigh in favor of declaring the Ohio investment tax credit unconstitutional.

## SUMMARY OF ARGUMENT

1. The purpose of the Court's dormant Commerce Clause jurisprudence is to prevent states from enacting tax policies designed to improve their own economic positions at the expense of the national marketplace. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Toward this end, the Court has repeatedly held that state policies that preference in-state business activity in a manner that

[1] This *amici curiae* brief in support of the briefs of the Respondents is submitted pursuant to Rule 37 of the Supreme Court Rules. The parties have consented to the filing of briefs *amicus curiae* and have filed blanket consent letters with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief was not authored in whole or in part by counsel for a party and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

harms out-of-state competitors improperly infringe on the federal government's core authority to regulate commerce. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981). Because of the Court's role as arbiter of disputes over interstate commerce, it has grown increasingly attuned to the practical economic effects of state policies. *See, e.g., American Trucking Assocs., Inc. v. Michigan Public Serv. Comm.*, 125 S.Ct. 2419 (2005). Following the Court's lead, *amici* believe that an empirical analysis of the economic and public policy impact of state tax incentives like the Ohio investment tax credit (ITC) on interstate commerce would illuminate the Court's constitutional analysis in this case.

2. What the empirical evidence shows is that state tax incentives like the Ohio ITC do, in fact, have substantial negative consequences for interstate commerce. Competition among the states for business activity through the offering of such state tax incentives is largely a zero-sum game in that economic gains to the state that enacts tax incentives are offset by losses to other states. Moreover, tax incentive competition has an overall negative effect on the national economy by producing business location decisions that are either economically inefficient (because firms do not locate in states with the lowest real costs of production) or wasteful (in that firms are given incentives to locate in states where they would go anyway). Finally, by fostering a "race to the bottom" in which states must continually increase tax incentives in order to lure businesses, tax incentive competition undermines the ability of state and local government to finance the investments in public education and infrastructure that provide the foundation for future economic growth. Because these consequences are precisely the type of harms

that the Commerce Clause was designed to prevent, *amici* believe that they provide support for the Sixth Circuit's conclusion that the Ohio ITC impedes interstate commerce in violation of the Constitution.

3. This harm to the national economy, moreover, is not offset by gains to the states engaging in incentive competition. Indeed, the local economic benefits claimed by advocates of such policies are negligible and, to the extent that they do exist, could be accomplished by alternative state polices that do not harm the national economy. In particular, the general conclusion based on extensive research on state tax incentives is that incentives are, at best, only marginally effective in changing the location of business activity. And even when they do, it is at the expense of spending on local infrastructure (education, utilities, transportation) that undercuts long-term growth. Because state investments in workforce development, technology, education, and public infrastructure are viable alternative means of enhancing state economic growth, tax incentives like Ohio's ITC can only be viewed as costly, inefficient policies.

## ARGUMENT

### I. AN ANALYSIS OF THE ECONOMIC IMPACT OF STATE TAX INCENTIVES IS RELEVANT TO THE CONSTITUTIONAL ISSUE AT STAKE

The Court's Commerce Clause jurisprudence is rooted in a fundamental concern about the destructive impact of certain types of state economic regulation on the national economic welfare. Though the Commerce Clause itself – which confers upon Congress the "Power . . . To regulate

Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3 – imposes no explicit limitation on the power of the states over their own economic activity, it has long been interpreted as providing an essential bulwark against self-interested state policies that injure the national market. Indeed, the inclusion of the Commerce Clause in the Constitution reflected

> the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

*Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). In order to protect against such "Balkanization," the Court has, through the "dormant" or "negative" aspect of the Commerce Clause, sought for nearly two hundred years to protect interstate economic activity by rooting out discriminatory state regulation. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994). Thus, even though the Commerce Clause itself is simply a grant of regulatory power to the federal government, what the "dormant" Commerce Clause jurisprudence stands for is the principle that the individual states may not usurp the federal role by enacting their own regulations that impede interstate commerce.

The paradigmatic violation of the dormant Commerce Clause is when a state imposes a tariff on goods imported from other states that is not imposed on in-state goods. *See West Lynn Creamery*, 512 U.S. at 193. However, the Court has made it clear that this paradigm does not exhaust the situations in which state regulation of economic activity will constitute a violation of the Commerce Clause. To the contrary, the Court has affirmed that state regulation that

preferences in-state economic actors to the detriment of their out-of-state counterparts is equally suspect from a constitutional perspective. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (holding that an ethanol tax credit limited to ethanol produced in Ohio or in a state with a similar tax credit provision violated the Commerce Clause principle of nondiscrimination); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (striking down New York tax credit for export-oriented corporations based on the proportion of New York business activity); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a Hawaii state law exemption on liquor tax for locally produced alcoholic beverages); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (striking down a Louisiana tax scheme that provided tax credits solely to in-state producers of natural resources); *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977) (holding that a New York statute that reduced the tax on in-state stock transfers in order to prevent the loss of stock trades from the New York Stock Exchange violated the Commerce Clause).

It is the concern with the detrimental impact of preferential state regulation on interstate commerce that lies at the heart of the Court's examination of the Ohio investment tax credit (ITC) at issue in this case. *See* Ohio Rev. Code Ann. §§ 5733.33(C)(1), (C)(2).[2] The key question before the Court is whether the ITC – which was given to DaimlerChrysler to construct a new vehicle-assembly plant in Toledo – constitutes economic discrimination in violation of the Commerce Clause.

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[2] We note that the Ohio tax credit in its general outlines is similar to the type of investment tax credits currently in place in 38 states. *See* COMMERCE CLEARING HOUSE, 2005 STATE TAX HANDBOOK 275-80 (2005).

At the core of this constitutional inquiry is a set of very practical questions: What are the real interstate economic impacts of state tax incentives like Ohio's ITC? Does the adoption of tax incentives by one state influence the level of economic activity in other states or otherwise impair the free flow of trade across state borders? Do state tax incentives actually yield economic benefits for states that adopt them? In order to assess whether the Ohio ITC and others like it impermissibly burden interstate commerce or actually promote productive economic competition between the states, it is therefore helpful to consider what we know as an empirical matter about the actual economic effects of such policies.

In its recent Commerce Clause jurisprudence, the Court has underscored the importance of examining the practical economic impact of challenged state policies.[3] For instance, in *American Trucking Assocs., Inc. v. Michigan Public Serv. Comm.*, 125 S.Ct. 2419 (2005), the Court held that Michigan's $100 flat fee imposed on trucks that "undertake point-to-point hauls between Michigan cities," *id.* at 2422, did not violate the Commerce Clause, *id.* at 2423. In reaching this conclusion, the Court emphasized that "the record contains little, if any, evidence that the $100 fee imposes *any significant practical burden* upon interstate trade." *Id.* at 2423-24 (emphasis added). Particularly given

[3] In a forthcoming article, Professor Kirk Stark and Federal Reserve Bank economist Daniel Wilson discuss the constitutional importance of considering the economic effects of tax incentives in the context of the *Cuno* controversy. *See* Kirk J. Stark & Daniel J. Wilson, *What Do We Know About the Interstate Economic Effects of State Tax Incentives?*, 4 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=868692.

the Court's central institutional role in resolving interstate commercial disputes, *Gibbons v. Ogden*, 22 U.S. 1 (1824), we believe it appropriate for the Court to give attention to the practical economic effects of state tax incentives in considering this case.[4]

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[4] The significance of undertaking such an analysis is highlighted by the frequency with which *amici* for the Petitioners invoke the practical economic impact of state tax incentives to support arguments in favor of their constitutionality. Indeed, a prominent theme in the *amici* briefs for Petitioners is that state tax incentives foster healthy economic competition between the states. *See* AlphaGenetics, Inc. *et al. Amici Curiae* Brief, at 19 (arguing that "the decision of the Court of Appeals will result in the unintended consequence of impeding innovation among early-stage companies and impacting on entrepreneurship"); City of New York *Amicus Curiae* Brief, at 2 (stating that an investment tax credit "helps to encourage increased local business activity"); National Governors Association, *et al. Amicus Curiae* Brief, at 13 (stating that "while there is no record here, the ITC likely functions in a manner that promotes interstate commerce" by reducing the purchase price of goods and serving as an export subsidy); Nissan *Amicus Curiae* Brief, at 25 (suggesting that Nissan's tax break package in Tennessee "transformed Tennessee's economy"); Pacific Legal Foundation *Amicus Curiae* Brief, at 3 (suggesting that state tax incentives like Ohio's promote "competitive federalism," "in which states compete with one another to provide the best regulatory regime for mobile citizens"); Tax Executives Institute, Inc. *Amicus Curiae* Brief, at 7 ("Investment tax credits, along with an array of other tax incentives, are widely used by States to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base."); Tax Foundation *Amicus Curiae* Brief, at 14 (stating that the sensitivity of companies like DaimlerChrysler to state tax systems "provides the opportunity for meaningful and beneficial tax competition among the States for jobs and investment"); The Right Place, Inc. and the City of Grand Rapids, Michigan *Amici Curiae* Brief, at 12 (arguing that if all states adopted a tax credit similar to the Ohio investment tax credit, "it would result in lower corporate taxes and more national commerce"). However, while these *amici* suggest that negative economic consequences would result from the elimination of state tax incentives like the Ohio ITC, there is a complete lack of empirical evidence provided to support this claim.

## II. THE ECONOMIC EVIDENCE SHOWS THAT STATE TAX INCENTIVES, AT BEST, PRODUCE A ZERO-SUM COMPETITION AND, AT WORST, RESULT IN A NATIONAL ECONOMIC LOSS

This part addresses the most fundamental concern of the dormant Commerce Clause: What are the inter-state economic consequences of state tax incentives?

### A. Tax incentive competition is at best a zero-sum game

To the extent that a state is successful in attracting more business investment through the offering of tax incentives, it does so at the expense of other states. That, in fact, is the stated rationale for incentive policies: to change the location choices of business firms. Moving business activity from one place to another has been described as a zero-sum game: the gain to one state is offset by a loss to another, with no net benefit to the nation. *See* Barry Rubin & Kurt Zorn, *Sensible State and Local Economic Development Policy*, 45 PUBLIC ADMINISTRATION REV. 333 (1985).

Recent studies on research and development (R&D) spending support this conclusion. While previous studies have looked at state tax levels and certain measures of economic growth in order to discern the influence of general tax reductions on economic activity, these more recent studies attempt to isolate the discrete effect of state tax incentives on firm investment behavior. In one recent study, for example, economist Dan Wilson of the Federal Reserve Bank examines firm-level data on research and development (R&D) spending in order to estimate how sensitive firm R&D spending is to its after-tax price or

"user cost," and specifically to state R&D credits. Daniel J. Wilson, *Beggar Thy Neighbor? The In-State vs. Out-of-State Impact of State R&D Tax Credits*, FEDERAL RESERVE BANK OF SAN FRANCISCO WORKING PAPER 08 (2005). Relying on comprehensive data of after-tax R&D prices, Wilson finds that state R&D tax credits do appear to spur R&D spending within the state adopting the credit. Wilson also finds, however, that the out-of-state effect is roughly opposite and equal in absolute value to the in-state effect. The key finding of Wilson's research that is most relevant for the dormant Commerce Clause analysis is the influence of R&D tax credits on R&D spending *in other states*. Thus, as the cost of research and development undertaken inside of State A decreases, as it would when State A enacts or increases R&D tax credits, the level of R&D activity undertaken outside of State A falls.

These results provide support for the view that a state's adoption of R&D tax credits has adverse practical effects on the level of R&D undertaken within other states. Over the past quarter-century, numerous states have adopted R&D tax credits, ostensibly to provide a friendly business climate for high-tech investment. *See* Daniel J. Wilson, *The Rise and Spread of State R&D Tax Credits*, FEDERAL RESERVE BANK OF SAN FRANCISCO ECONOMIC LETTER, Number 2005-26 (October 14, 2005). For example, California adopted its R&D tax credit in 1988, allowing businesses a credit equal to 20 percent of the excess of the taxpayer's "qualified research expenses" over a specified base amount.[5] Based on Wilson's findings, the

[5] For a description of California's R&D tax credit, see BRONWYN HALL & MARTA WOSINKA, THE CALIFORNIA R&D TAX CREDIT: DESCRIPTION, HISTORY, AND ECONOMIC ANALYSIS (1999).

expected effect of a state's adoption of such a credit would be an increase in R&D spending in that state and a corresponding decrease in other states. It is as though a single state has appropriated for itself the power to direct the geographical sourcing of R&D spending – precisely the sort of "regulation of interstate commerce" that the Court's dormant commerce clause jurisprudence is meant to foreclose.

### B. Tax incentive competition produces economic inefficiency

When viewed from the perspective of the national economy, the evidence suggests that state tax incentive competition is likely more damaging than a zero-sum game: It is, in fact, a negative-sum game in that the distortions it creates produce inefficient locational decisions that result in a national economic loss. *See* Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, 9 THE REGION (Federal Reserve Bank of Minneapolis) 3 (March 1995). In order to understand the harmful national consequences of state tax incentives, we must first consider the range of factors that a business considers when choosing a location in which to build, relocate, or expand a facility:

i. Access (transport cost and reliability) to raw materials or components;

ii. Access to the major markets for the finished products;

iii. Availability of labor with needed skills and the productivity of that labor;

iv. Wage rates;

v. Employee health insurance costs;

vi. Energy and telecommunications services costs; and

vii. Quality of local public services, particularly those related to education and training of the labor force, infrastructure investment, and public safety.

Businesses naturally seek locations with the lowest resource cost. That is, they seek to minimize the costs of transporting raw materials or finished products, the total cost of labor embodied in the finished product, and the costs for energy, water, sewer, and communications services. These costs to the firm also reflect the real social costs associated with consumption of scarce resources. When firms minimize transport costs, for example, society gains: For a given volume of finished product, the economy consumes the minimum tons of concrete and gallons of gasoline required for the transportation services needed to produce and deliver those finished products. The efficient operation of the national economy requires that firms choose the least-cost locations, a result generally produced by the competitive pressures on firms to reduce costs.

The purpose of tax incentives is to change location decisions. Two Federal Reserve economists have argued that incentives, if they are effective in changing the location of economic activity, change the distribution of facilities from the set of least-cost locations as described above to one that consumes more resources and is therefore less efficient. *See* Burstein & Rolnick, *supra*. These economists describe this as a "negative-sum" result because the benefits and costs to local economies offset each other (the zero-sum game), but the losses to the national economy produce a negative sum.

One counter argument is that incentives simply reinforce the existing geographic pattern of costs. However, this argument does not save them from the charge of inefficiency. To the contrary, to the extent that incentives do reinforce existing cost patterns, they are entirely inefficient since the same location decisions would have been made in the absence of incentives. Incentives only make a difference when they trump economic considerations and induce inefficient location choices.[6]

There is an additional way in which incentive competition can produce net losses. When a business firm actually

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[6] We do not suggest that the Commerce Clause prohibits, or that sound economic development policy should avoid, all state policies that pursue other values at the cost of economic efficiency. First, the Commerce Clause, in this context, applies only to tax policy and leaves states free to pursue economic development or social policy goals by other means. *See New Energy*, 486 U.S. at 278 ("The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does."). Second, the Commerce Clause prohibits only those tax policies that seek to enrich one state by moving economic activity to that state from another state. The Commerce Clause does not prohibit states from using tax policy to encourage desired corporate behavior within a state, or even to encourage location decisions within a state that may be economically inefficient but meet other policy objectives. *Id.* Similarly, the Commerce Clause obviously does not limit the ability of the *federal* government to encourage location decisions based on factors other than economic efficiency. Rather, the basic constitutional limitation is a narrow one: States cannot use their sovereign taxing power to pursue the goal of strengthening their own economies by undermining the economic base of other states. In setting this policy, the framers of the Constitution were not only establishing an important rule to protect political and social harmony among the several states, they were also practicing fundamentally sound economic theory.

relocates an existing facility, it moves from a locality with the necessary public infrastructure and services already in place, to a locality that must expand services to accommodate the facility and the population growth that ensues. The result is redundant public investment in the old locale that must then be maintained with revenues from a smaller tax base, while resources must be committed to provision of new public investment in the new locale.[7] While these effects are felt locally, they represent real national economic costs.

### C. Tax incentive competition harms long-term economic growth

As part of the interstate competition, one state's decision to provide tax incentives to businesses induces reciprocal behavior on the part of other states. In order to "win" the interstate competition for new business activity, states are therefore placed in the position of having to continually increase tax breaks to lure businesses. As a result of this "race to the bottom," over time the zero-sum game becomes more costly to states as they devote larger shares of their budgets to the provision of tax incentives.[8]

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[7] Several studies have estimated the cost of public investments, particularly streets and highways, necessitated by new business development. For a review of research on this topic see ALAN ALTSHULER & JOSE GOMEZ-IBANEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 77-96 (1993).

[8] In a study of 20 states that together accounted for 75% of the manufacturing investment in the U.S., Alan Peters and Peter Fisher documented the growth of incentive programs from 1990 to 1998 and found that the average set of state and local tax incentives for manufacturing activity had approximately doubled in value (measured as the percentage reduction in total state-local taxes) over that eight-year

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This country has a well-developed intergovernmental system that places responsibility on states and localities for providing the public services that businesses directly use and depend on: education for entrants into the labor force, police and fire service, and the provision of local infrastructure (such as streets, and water and sewer systems). Investment in these services provides the foundation for economic activity. Tax incentive competition undermines the ability of state and local governments to provide those services by diverting revenues to a costly and wasteful competition with one another. *See* Burstein & Rolnick, *supra*. As such it operates to degrade the quality of basic services that the nation needs to foster future growth.

### D. Tax incentive competition does not enhance international competitiveness

Some have argued that incentive competition drives down the average level of state and local taxes on business activity in the U.S., which in turn makes the nation more competitive in the world economy. However, there is reason to be skeptical of this claim. For one, U.S. state and local taxes are a small part of the overall cost of doing business and are already quite low compared to other industrialized countries. Among the 30 nations in the Organisation for Economic Cooperation and Development, the U.S. ranks 29th in terms of total federal, state and

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period. ALAN PETERS & PETER FISHER, STATE ENTERPRISE ZONE PROGRAMS: HAVE THEY WORKED? 56-69 (2002); *see also* KENNETH THOMAS, COMPETING FOR CAPITAL 158-59 (2000) (finding that state and local business tax incentives and subsidies had grown in the 1990s and approached $49 billion in 1996).

local taxes as a percent of gross domestic product. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REVENUE STATISTICS 1965-2003 (2004). Furthermore, when one considers the range of economic factors that play a significant role in firm location decisions – transportation, wages, and productivity – there is obviously enormous variation across the globe. U.S. state-local taxes are inconsequential when compared to differences in wages between, for example, Ohio and China. Because of this, a reduction in Ohio taxes would not have a decisive influence on a firm's decision to locate in China.

Moreover, to the extent that international competitiveness is an important policy concern, it is not of constitutional importance here. To the contrary, under the explicit terms of the Commerce Clause, the regulation of international commerce is squarely within the domain of the federal government. U.S. Const. art. I, § 8, cl. 3 (leaving to Congress the power to "regulate Commerce with foreign Nations").

## III. STATE TAX INCENTIVES DO NOT PRODUCE MEANINGFUL INTRASTATE ECONOMIC BENEFITS THAT JUSTIFY THEIR HARMFUL INTERSTATE EFFECTS

Once we understand the negative consequences of state tax incentives on the national economy, the question arises: Are they nevertheless worth it for the states that enact them? Under the Supreme Court's dormant Commerce Clause jurisprudence, even a discriminatory tax incentive may be upheld if "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. Do state tax incentives of the sort at issue here

produce the types of intrastate economic benefits that might still warrant their use? As we discuss in this section, the weight of the economic evidence suggests that the answer to this question is no. Specifically, we present evidence that the effects of state tax incentives on business location are small; incentives are costly to the states that offer them; and states have available to them a wide array of alternative economic development policies that are in fact cost-effective and beneficial to the national economy.

### A. Tax incentives are at best marginally effective in altering business locations

Some state and local government officials believe that business tax incentives are an effective policy tool to promote economic development in their states and localities. This belief is not supported by the evidence. Economists have researched this issue extensively over the past three decades. In fact, over 75 studies have been conducted exploring the question: Do taxes, or tax incentives, produce growth in investment or jobs? *See* Michael Wasylenko, *Taxation and Economic Development: The State of the Economic Literature*, NEW ENGLAND ECON. REV. 37 (March-April 1997).[9] The general conclusion that

[9] Much of this research has investigated the effects of reductions in the level of taxation rather than the effects of tax incentives per se. However, a tax incentive is by definition a reduction in a tax, so that the effects of "tax reductions" or "incentives" on economic activity will be similar. In discussing the research literature, we will use the term "incentives" to refer to tax reductions of whatever form. In doing so, however, we are not suggesting that tax reductions be subject to same constitutional scrutiny as tax incentives. Indeed, the Court has made it clear that general reductions in state tax levels do not raise dormant Commerce Clause concerns. *See West Lynn Creamery*, 512 U.S. at 199

(Continued on following page)

can be drawn from this large body of research is that incentives are, at best, only marginally effective in changing the location of business activity. *See* ROBERT G. LYNCH, RETHINKING GROWTH STRATEGIES: HOW STATE AND LOCAL TAXES AND SERVICES AFFECT ECONOMIC DEVELOPMENT (2004); Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. OF THE AMERICAN PLANNING ASSOC. 27 (Winter 2004); Wasylenko, *supra*. In addition, recent research has called into question whether the location of new firms produces significant net benefits for the host community. *See* William F. Fox & Matthew N. Murray, *Do Economic Effects Justify the Use of Fiscal Incentives?*, 71 SOUTHERN ECON. J. 78 (2004). As a result, there is reason to believe that tax incentives are both costly and potentially counterproductive even to the states that use them "successfully."

Firms consider the whole range of factors discussed earlier (access, labor productivity and cost, energy cost, public services) when choosing a location for a new facility or for relocating an existing facility. States vary widely on all these dimensions. Differences in state and local taxes are actually of little significance when stacked up against differences in these other costs. On average, state-local taxes falling on businesses represent only about 1.2% of the total cost of doing business in the U.S. *See* LYNCH, *supra*, at 4. A tax incentive that reduces this tax burden, therefore, would obviously represent an even smaller percentage of the total cost of doing business.

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n. 15 (stating that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes").

For the vast majority of investment and location decisions, therefore, tax incentives will be swamped by differences in other economic factors. Labor costs, for example, are about 14 times the average state and local tax cost. *See* TIMOTHY BARTIK, WHO BENEFITS FROM STATE AND LOCAL ECONOMIC DEVELOPMENT POLICIES? 61 (1991). Thus even a tax incentive equal in value to 50% of the total state-local tax burden in a state would be more than offset by a mere 4% difference in wages between that state and another, because 4% of the wage bill is worth more than 50% of the annual tax bill. Furthermore, the incentive is temporary, while the wage difference may well persist for years. Thus we should expect, from the beginning, to find that tax incentives rarely tip the balance one way or the other; they would do so only in those few cases where the other cost factors are equal between two locations.

The effectiveness of tax incentives in stimulating economic activity can be researched by exploring the following hypotheses: If incentives are effective, then states or places that offer incentives should experience more growth than those that do not; states or places with larger incentives should experience more growth than those with smaller incentives; and states or places that adopt incentives should experience a higher growth rate after adoption than prior to adoption. These hypotheses can be tested statistically, by comparing growth across states to the incentives in those states, controlling for the other factors that influence growth rates. The hypotheses can be tested over time as well, comparing growth rates before and after the adoption or expansion of incentives, again controlling for other factors that changed over the time period in question.

Earlier studies (in the 1950s through the mid-1970s) generally concluded that incentives make little or no difference in the location or investment behavior of firms. *See, e.g.*, John Due, *Studies of State-Local Tax Influences on Location of Industry*, 14 NATIONAL TAX J. 163 (1961). Later studies that were more sophisticated methodologically found small effects.[10] One of the important differences is that these more recent studies found better ways to control for the influence of public services on growth. That is, they were better at finding the independent influence of incentives, holding all other factors (including public service levels) constant. It is important to understand what this means. What the recent studies found, in effect, is that states that offer larger incentives can expect some modest increase in economic activity provided that they can somehow do so without cutting public services.[11] The research findings are thus much more limited in scope than is often claimed, for they mean only that if a state can somehow be more efficient, providing the same level of services with lower taxes, then it will experience more economic growth (though not a lot more). It certainly does not mean that business tax incentives financed by service cuts will produce growth. *See* LYNCH, *supra*.

In the real world, state and local governments must, for the most part, balance their budgets. Business tax

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[10] For one of the earliest reviews of several studies showing positive effects, see Robert Newman & Dennis Sullivan, *Econometric Analysis of Business Tax Impacts on Industrial Location: What Do We Know, and How Do We Know It?*, 23 J. OF URBAN ECONOMICS 215 (1988).

[11] Reviews of these studies can be found in BARTIK, *supra*; LYNCH, *supra*; Peters & Fisher, *The Failures of Economic Development Incentives*, *supra*; and Wasylenko, *supra*.

incentives must be offset by cuts in spending or increases in other taxes. Studies have found that public services, particularly education and infrastructure, are important factors contributing to growth. *See* LYNCH, *supra,* at 43-46; *see also* Ronald Fisher, *The Effects of State and Local Public Services on Economic Development*, NEW ENGLAND ECONOMIC REVIEW 53 (March/April 1997). If a state provides business tax incentives and cuts services at the same time, the research suggests that the magnitude of the negative effects of the spending cuts could be enough to offset the positive effects of the tax cut. *See* LYNCH, *supra*; Fisher, *supra*. In fact, research indicates that tax increases that finance spending increases can actually provide some economic stimulus. *See* LYNCH, *supra* (discussing the results of five separate studies). The positive effects of spending may (depending on the nature of the spending) be greater than the negative effects of business tax increases. *Id.*

In the mid-1990s, some economists argued that a consensus of sorts had been reached on the long-term effectiveness of state business tax incentives. *See* Timothy Bartik, *Jobs, Productivity, and Local Economic Development: What Implications Does Economic Research Have for the Role of Government?*, 47 NATIONAL TAX J. 847, 852 (1994); Wasylenko, *supra*, at 49. The measure of their effectiveness is summarized in an elasticity: the percentage change in business activity produced by a given percentage change in tax incentives. The consensus was that this elasticity was around .2 or .3, which means that an incentive equivalent to a 10% cut in taxes would eventually produce a 2% to 3% increase in economic

activity, provided, again, that incentives were not accompanied by cuts in public services.[12]

Is this a large effect or a small effect? One way of addressing this question is to ask: Given that level of influence, how much of the economic growth experienced by a state will be attributable to the incentives? Public officials routinely assert or assume that the answer to this question is: All of it. Once incentives are adopted, all subsequent growth is attributed to the incentives, as if no growth would occur on its own. This assumes that tax incentives are always the decisive factor, which flies in the face of the evidence that other factors are much more important, and tax incentives are rarely the decisive factor.

A typical array of business incentives offered for the average manufacturing business is equivalent to about a 30% cut in the state and local tax burden over a period of 20 years. *See* PETERS & FISHER, STATE ENTERPRISE ZONE PROGRAMS: HAVE THEY WORKED?, *supra* at 113. What the research shows is that, given incentives of this magnitude, and given the more generous estimate of incentive effectiveness (an elasticity of .3), only about 1 in 11 business investments can be attributed to the incentives. *See id.* The rest of the investment would have occurred anyway. Moreover, the effects of service cuts necessitated by the incentives may well offset even these modest gains, reducing the 9% effectiveness to near zero.

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[12] An elasticity of .2 means that the percentage change in economic activity will equal .2 times the percentage change in taxes. This elasticity measures change over the long run; that is, the ensuing growth occurs not immediately but over a period of many years.

### B. Tax incentives are costly

The crux of the problem for state governments is this: Since the vast majority of business decisions will hinge on factors other than taxes, when you offer tax incentives, you have to spend an enormous amount of money (in the form of tax breaks that were unnecessary) to get a small benefit. This makes the tax cut strategy expensive and wasteful. Furthermore, even that low level of effectiveness, gained at high cost, is attainable only if the state can finance the tax cuts in a way that does not drive business from the state. Cuts in spending on education and infrastructure will offset any gains from the tax cuts and in fact will damage the state's long-run economic prospects. Yet it will be difficult to finance significant tax cuts year after year without reducing spending for education, transportation, utilities, and public safety. Those categories account for the majority (55%) of state and local budgets.[13]

### C. Tax incentives are an inferior policy tool given the alternative strategies available to encourage economic development

States have available to them a variety of strategies to foster economic growth. States invest in workforce development, for example, which benefits both the workers whose skills and earning potential are upgraded and the

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[13] This figure is calculated by dividing the sum of expenditure of all state and local governments in the U.S. for education, transportation, public safety, and utilities by the sum of direct general expenditure and utility expenditure. *See* UNITED STATES CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS, Table 1 (State and Local Government Finances by Level of Government and by State: 2001-2002), *available at* http://ftp2.census.gov/govs/estimate/02slsstab1a.xls.

businesses that then can draw from a pool of higher skilled labor. States invest in business development through university technology transfer programs, business incubation centers, small business development assistance, and support for the provision of venture capital. *See, e.g.*, PETER K. EISINGER, THE RISE OF THE ENTREPRENEURIAL STATE (1988) (analyzing state high technology initiatives and venture capital programs). Most importantly, states invest in public education, which is essential to the development of the kind of workforce demanded in a modern economy. And they provide, often through local government, the public infrastructure essential to economic activity: streets and highways, public transit, water and sewer systems, and police and fire protection.[14]

The common feature of all of these alternative strategies for enhancing state economic growth is that they are productive and important activities from a national perspective as well. They are not beggar-thy-neighbor approaches, but instead are efforts to reinforce and enhance the nation's economic base. Furthermore, they are not hampered by the fundamental problem with incentives: the asymmetry of information that leads governments to spend money without knowing whether or not it is needed (since the business investment likely would have occurred anyway). As such, these alternatives are bound to be more cost effective.[15]

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[14] Evidence of the importance of education, streets and highways, and public safety services on state economic growth can be found in Fisher, *supra*.

[15] Timothy Bartik is among those who have argued for a greater focus of state economic development policies on programs that enhance business productivity, and cites some evidence of the effectiveness of

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Far from creating irreparable harm to state economic development efforts, a court decision invalidating tax incentives would end a very inefficient, costly, and wasteful practice and free up state resources to devote to economic development strategies that are at once more cost effective to the states and beneficial, rather than harmful, to the national economy. From a constitutional perspective, the existence of these more effective economic development alternatives further undercuts the validity of discriminatory tax incentives like Ohio's ITC.

### D. Incentive strategies are adopted for political, not economic, reasons

The economic war between the states continues unabated, not for sound economic reasons, but for a variety of political reasons. The opening of a new plant that benefited from tax incentives provides politicians with a valuable opportunity to take credit for something of tangible benefit to the state, even if the incentives in actuality played no part in the firm's decision. The investments in education and infrastructure that would be of greater long-term economic benefit, on the other hand, will produce results that are less tangible, harder to take credit for, and that occur long after most current elected officials have left office.

The political risk associated with "losing" a major employer, or failing to land a new manufacturing facility after an intense competition with other states, is enormous. The risk associated with spending money unnecessarily

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certain workforce training and technology programs. Bartik, *Jobs, Productivity, and Local Economic Development, supra*.

is small, particularly since, sooner or later, there will be business expansions or relocations somewhere in the state that can be attributed to the spending, and it will rarely be clear to the public that the spending was unnecessary. *See* Terry F. Buss, *The Effect of State Tax Incentives on Economic Growth and Firm Location: An Overview of the Literature*, 15 ECON. DEV. Q. 92 (February 2001). Furthermore, incentives can be couched as tax cuts, not spending programs, even though, as "tax expenditures," they are equivalent. It is difficult to run for office on a platform opposing tax cuts that appear to have little cost to the average taxpayer and that one's opponent will argue create jobs.

Thus the political incentives are all on the side of granting incentives. Benefits to the state can always be plausibly asserted, however weak the causal connection, and the costs in lost revenue are hidden. Disavowing tax incentives, on the other hand, presents great risks and few benefits to political leaders, as their opponents in the next election will attack them for failing to do all they could to capture development and increase jobs. It is no wonder that states, left to themselves, continue the race to the bottom.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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The *amici curiae* include the following economics and public policy scholars:

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Howard Chernick is a professor at Hunter College of the CUNY Graduate School. He holds a Ph.D. in economics from the University of Pennsylvania and is a Research Affiliate of the Institute for Research on Poverty at the University of Wisconsin-Madison. Before coming to Hunter College in 1982, he was a senior researcher in the U.S. Department of Health and Human Services. From 1989-90 he was a Visiting Fellow at the Russell Sage Foundation.

Professor Chernick's research specializes in the economics of the public sector, with special attention to the distributional impacts of government spending and taxation. He is a recipient of the Presidential Award for Excellence for applied Scholarship, Hunter College, 2005. He is actively involved in public policy in New York, serving as a consultant to the City of New York Independent Budget Office and the Campaign for Fiscal Equity.

Peter Fisher is a professor in the Graduate Program in Urban and Regional Planning at the University of Iowa, where he has taught since 1977. His research and interests are centered on state and local government finance, economic development policy, and poverty and income inequality. He has consulted with state government agencies in Ohio and Iowa regarding tax incentives and economic development policy. He has written or co-authored three books: Peter Fisher and Alan Peters, INDUSTRIAL INCENTIVES: COMPETITION AMONG AMERICAN STATES AND CITIES (Upjohn Institute for Employment Research, 1998) Alan Peters and Peter Fisher, STATE ENTERPRISE ZONES: HAVE THEY WORKED? (Upjohn Institute, 2002); and Peter Fisher, GRADING PLACES: WHAT DO THE BUSINESS CLIMATE RANKINGS REALLY TELL US? (Economic Policy Institute, 2005). His article, co-authored with Alan Peters, *The Failures of Economic Development Incentives*, (JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, Winter 2004), won the prize for the best article in that journal in 2004.

Robert G. Lynch is the Everett E. Nuttle Professor of Economics and Chair of the Department of Economics at Washington College, where he has taught since 1998. He is also a Research Associate with the Economic Policy Institute. From 1983 to 1998, he taught at the State

University of New York at Cortland where he served as Chair of the Department of Economics between 1991 and 1993. He also taught at Huanghe University (1985-86) in the People's Republic of China. Dr Lynch has served as a consultant to numerous organizations including private businesses, governments, labor unions, and research organizations. His areas of specialization include Public Policy, Public Finance, International Economics, Economic Development and Comparative Economics. Over the past 20 years Dr. Lynch has evaluated the adequacy and effectiveness of various state and local government economic policies, reviewed government economic growth strategies, and studied the efficiency, fairness, and stability of state and local tax systems. He is the author of numerous works that have analyzed the effectiveness of state and local government economic policies in promoting economic development and creating jobs including his 2004 publication RETHINKING GROWTH STRATEGIES: HOW STATE AND LOCAL TAXES AND PUBLIC SERVICES AFFECT ECONOMIC DEVELOPMENT. In addition, he has written several papers that examined issues related to the definition and measurement of income inequality.

Thomas Maloney received his Ph.D. in economics from the University of Michigan in 1992 and was a Post-Doctoral Fellow at the Center for the Study of Urban Inequality, University of Chicago, from 1992 to 1994. He is currently an Associate Professor in the Department of Economics at the University of Utah. His research on U.S. economic history, racial discrimination, migration, and labor markets has appeared in the JOURNAL OF ECONOMIC HISTORY, EXPLORATIONS IN ECONOMIC HISTORY, SOCIAL SCIENCE HISTORY, THE JOURNAL OF INTERDISCIPLINARY HISTORY, ECONOMIC INQUIRY, and elsewhere. He served on the

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Dick Netzer is Professor Emeritus of Economics, Planning and Public Administration at New York University's Wagner Graduate School. He has worked in urban public finance and urban economics as a researcher, teacher, consultant, and public official for more than 40 years. He is the author of ECONOMICS OF THE PROPERTY TAX

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Robert B. Reich is Professor of Public Policy at the Goldman School of Public Policy at the University of California at Berkeley. He has served in three national administrations, most recently as secretary of labor under President Bill Clinton. He has written ten books, including THE WORK OF NATIONS, which has been translated into 22 languages; the best-sellers THE FUTURE OF SUCCESS and LOCKED IN THE CABINET, and his most recent book, REASON. His articles have appeared in the NEW YORKER, ATLANTIC MONTHLY, NEW YORK TIMES, WASHINGTON POST, and WALL STREET JOURNAL. Mr. Reich is co-founding editor of THE AMERICAN PROSPECT magazine.

Andrew Reschovsky is Professor of Applied Economics and Public Affairs at the University of Wisconsin, Madison Robert M. La Follette School of Public Affairs. His research focuses on tax policy and intergovernmental fiscal

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John L. Solow is Associate Professor of Economics at the University of Iowa's Tippie College of Business. Professor Solow received his B.A. from Yale University and M.A. and Ph.D. from Stanford University and joined the Iowa faculty in 1981. He has published articles in the areas of energy and natural resource economics, tax incidence and durable goods markets, and his research interests include law and economics, antitrust, and public policy. He has worked at the Federal Energy Administration and the Electric Power Research Institute, served as a consultant to the U.S. Departments of Energy and Justice, MidAmerican Energy, Qwest Telecommunications and numerous law firms, and has been a visiting scholar at Stanford University, the University of Auckland in New Zealand, and Monash University in Australia.

Kenneth P. Thomas received his Ph.D. in Political Science from the University of Chicago in 1992. An internationally known expert on subsidies, he is the author of COMPETING FOR CAPITAL: EUROPE AND NORTH AMERICA IN A GLOBAL ERA (Washington: Georgetown University Press, 2000),

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John Yinger is Trustee Professor of Public Administration and Economics at the Maxwell School, Syracuse University, and Director of the Education Finance and Accountability Program in the Maxwell School's Center for Policy Research. Professor Yinger has taught at Syracuse since 1986; he has also held academic positions at Harvard University, the University of Michigan, and the University of Wisconsin. His recent scholarly publications include articles on education finance, the incidence of the property tax, and the causes of housing discrimination. Professor Yinger has authored or co-authored four books, two on topics in local public finance, one on discrimination in housing markets, and one on discrimination in mortgage lending. His edited volume, HELPING CHILDREN LEFT BEHIND: STATE AID AND THE PURSUIT OF EDUCATIONAL EQUITY, was published in June, 2004. Professor Yinger has also been a Senior Staff Economist at the President's Council of Economic Advisors, and he was co-director of a tax study in Nebraska and an aid commission in Minnesota.

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IN THE

# Supreme Court of the United States

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DAIMLERCHRYSLER CORPORATION,
*Petitioner*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICI CURIAE* CITY OF ELYRIA, OHIO, CITY OF NORTH RIDGEVILLE, OHIO, CITY OF AVON LAKE, OHIO AND CITY OF AVON, OHIO IN SUPPORT OF PETITIONER

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IN THE

# Supreme Court of the United States

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Nos. 04-1704 and 04-1724

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DAIMLERCHRYSLER CORPORATION,
*Petitioner*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICI CURIAE* CITY OF ELYRIA, OHIO, CITY OF NORTH RIDGEVILLE, OHIO, CITY OF AVON LAKE, OHIO AND CITY OF AVON, OHIO IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE* [1]

*Amici curiae*, the Cities of Elyria, North Ridgeville, Avon Lake, and Avon, Ohio, are four chartered municipal corporations located in Lorain County in northeastern Ohio. They maintain that the Sixth Circuit's erroneous construction of the Commerce Clause and invalidation of Ohio's investment tax

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

credit set forth in O.R.C. § 5733.33 will have profoundly adverse impacts on their local economies. Thousands of jobs and millions of investment dollars are in jeopardy of being lost in Lorain County, Ohio, alone if the Sixth Circuit's decision invalidating the Ohio investment tax credit were permitted to stand.

Ohio should be free to "structure [its] tax system[] to encourage the growth and development of [its own] intrastate commerce and industry." *Boston Stock Exchange v. Tax Comm'n*, 429 U.S. 318, 336 (1977). This is central to Ohio's ability to hold its own in interstate competition with other states for economic development, manufacturing facilities and job creation. As this Court has emphasized, "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

Ohio's investment tax credit is central to the successful efforts of the State of Ohio and its political subdivisions to encourage new local capital investment by foreign and domestic manufacturing businesses alike. Because the four municipalities would be severely hampered in their ability to compete for economic development and revitalization of their industrial base without the ability to use incentives such as Ohio's investment tax credit, *amici* have a substantial interest in the outcome of this case.

## SUMMARY OF THE ARGUMENT

The Ohio investment tax credit does not violate the dormant Commerce Clause. In fact, it promotes both interstate and intrastate commerce by providing incentives for additional economic development and capital investment in local communities in Ohio.

For a company with no presence in Ohio, the investment tax credit encourages the interstate location of new facilities in Ohio without any "coercion" from Ohio's franchise tax

because the company has no pre-existing Ohio tax liability and would be taxed (subject to the credit) only on its new business activities in Ohio. If, however, the foreign corporation chose to invest in another state instead of Ohio, there would be no Ohio tax liability and the investment tax credit would have no extraterritorial impact—neither increasing nor decreasing the corporation's franchise tax liability in another state.

For a company already present and conducting business operations in Ohio, the actual effect of the investment tax credit on its decision whether to invest in new machinery and equipment within or outside Ohio is the opposite of the Sixth Circuit's misassumption that any in-state benefit must create a corresponding out-of-state economic burden. If the company chooses to expand its existing business activities in Ohio, the in-state capital investment that boosts production and sales will typically ***increase*** the company's Ohio franchise tax liability which is calculated on both a net worth and net income basis and levied on the higher of the two tax computations. The partial tax credit usually offsets only a portion of the company's ***future*** tax liability as a result of its newly-augmented taxable base. O.R.C. §§ 5733.05(B) and (C); 5733.06. Conversely, if the corporation chooses to invest out-of-state rather than in Ohio, its Ohio franchise tax liability is likely to be reduced under Ohio's apportionment formula[2] because the out-of-state investment decreases the percentage of the company's Ohio business value and activity subject to taxation in Ohio vis-à-vis the company's aggregate activities measured on a national scale. Far from increasing the Ohio franchise tax burden on a company already doing business in Ohio, its out-of-state investments would add to the flow of interstate commerce and would generally ***reduce*** the company's pre-existing Ohio franchise tax liability. Thus, the Ohio investment tax credit neither burdens out-of-state

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[2] O.R.C. § 5733.05(B)(2).

economic activity, increases the tax liability of out-of-state actors, decreases the tax liability of in-state actors at the expense of out-of-state businesses, nor discriminates against interstate commerce.

The Ohio investment tax credit is unlike any aspect of state tax law that this Court has previously invalidated on dormant Commerce Clause grounds. The Court has emphasized that the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977), and that it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385 (1991).

The court of appeals seriously overreached in declaring the Ohio investment tax credit to be unconstitutional and in enjoining its enforcement. This Court should reject on intersecting Commerce Clause and federalism grounds the significant encroachment on the powers of a state to structure its tax system in order "to encourage the growth and development of [its] commerce and industry" that the Sixth Circuit's decision below represents.

## ARGUMENT

### THE OHIO INVESTMENT TAX CREDIT PROMOTES RATHER THAN BURDENS INTERSTATE COMMERCE.

Ohio's tax incentive for local investment does not discriminate against interstate commerce; in fact, it meaningfully promotes interstate commerce. This Court has explained that the "the Commerce Clause prohibits economic protectionism—that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330

(1996).[3] Ohio's investment tax credit neither seeks nor achieves economic protectionism. It rewards specific in-state economic development but provides no systematic advantage to local businesses, activities or transactions over out-of-state actors, activities or transactions. While the Ohio investment tax credit benefits ***local*** development—as all economic development incentives do—that is not the same thing as economic protectionism.

The Ohio investment tax credit does not discriminate against interstate commerce. Discrimination prohibited by the Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994). The anti-discrimination principle is designed to invalidate protectionist laws that provide a competitive advantage to in-state businesses or in-state commercial activities.[4] But the Ohio investment tax credit does not discriminate against any entity on account of its out-of-state location, activities or transactions. Simply put, the Ohio investment tax credit poses no discriminatory burden on interstate commerce whatever. It does not, for example, tax out-of-state companies more for engaging in activities outside Ohio than in-state

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[3] Internal quotations from *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994) and *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988), respectively, omitted in the interests of clarity.

[4] *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (the primary purpose of the dormant Commerce Clause is "to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than provide the basis for questioning a State's right to experiment with different incentives to business").

businesses for engaging in activities in Ohio; in fact, the effect of the investment tax credit is quite the opposite. Nor does it penalize any commercial actor for engaging in transactions or economic activities outside Ohio.

Suppose the existence of two identical manufacturing businesses. Each has decided to spend an identical amount of capital in the same tax year of 2005 for new equipment and machinery. One company has no Ohio operations or presence; the other company has had Ohio operations and an Ohio presence for a period of time longer than the preceding four years.[5] For the out-of-state company, the Ohio investment tax credit promotes interstate commerce by encouraging it to invest in new economic development in Ohio. This incentive is crucial to the ability of local governments to compete and attract businesses to relocate or expand their local operations.

If the out-of-state company decided to invest in new machinery and equipment in Ohio, it would be entitled to a credit equal to the entire 7.5% of its expenditures on new

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[5] The Ohio investment tax credit for new machinery and equipment purchased in 2005 and installed in Ohio would equal 7.5% of the difference by which the company's 2005 qualifying investments exceeded the annual average of its qualifying expenditures in Ohio during the three years 1999, 2000 and 2001. R.C. § 5733.33(C)(1). The credit so computed would then be spread in equal parts over the succeeding seven years through 2012, R.C. § 5733.33(C)(4), and credited against the company's Ohio franchise tax (based on the company's net worth) or income tax (based on net taxable income) liabilities in those years. R.C. § 5733.33(B)(1). In Ohio, a company calculates both its franchise tax and its income tax for each year, R.C. §§ 5733.05(B) and (C), and pays the higher of the two taxes. R.C. § 5733.06; *Wesnovtek Corp. v. Wilkins*, 105 Ohio St.3d 312, 2005-Ohio-1826, ¶ 2 ("[t]he Ohio franchise tax is an excise tax levied upon corporations for the privilege of doing business in the state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance authorizing it to do business in this state").

machinery and equipment installed in Ohio against the new franchise or income tax liability its new Ohio operations would generate, since it has no prior qualifying investments in Ohio. There would be no "coercion" created by the state's taxing power in the sense that concerns Professor Hellerstein[6] because the company would be taxed only on new activities in Ohio that generated new franchise tax or income tax liability.

If, however, the out-of-state company decided to make the investment in its home state, or in any other state for that matter, Ohio's investment tax credit has absolutely no effect on the company's tax liability. The company has no Ohio franchise or income tax liability, and the Ohio investment tax credit neither increases nor decreases the company's tax liability, if any, in the state in which it located the new investment of machinery and equipment.

The foregoing stands in stark contrast to protectionist state statutes that (i) impose greater tax liability on out-of-state economic activities than on identical in-state activities,[7] (ii) burden out-of-state consumers with greater tax liability than in-state consumers who are "substantially protected against the impact of the [tax],"[8] (iii) "impose[] greater burdens on economic activities taking place outside the State than were placed on similar activities within the State" and penalize increased out-of-state commercial activities even when the amount of in-state business remained constant,[9]

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[6] *See, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 806-15 (1996).

[7] *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 (1977).

[8] *Maryland v. Louisiana*, 451 U.S. 725, 756, 757 (1981).

[9] *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 401 & n.9, 404 (1984).

(iv) levy a tax on all products sold within the state but exempt from such tax those products made by in-state manufacturers,[10] (v) provide a tax credit against a state sales tax on the sale of products produced in-state but not on the sale of out-of-state products,[11] and (vi) tax both in-state and out-of-state activities for the purpose of funding rebates or subsidies to the in-state actors.[12] Each of these discriminatory state taxes invalidated by this Court on dormant Commerce Clause grounds is fundamentally distinguishable from the Ohio investment tax credit at issue in this case.

For the company already located in Ohio, the choice is whether to expand or replace its facilities in Ohio or to locate the new investment in another state. If the new machinery and equipment will be used to expand production over and above existing capacity, then the decision to invest in Ohio would actually ***increase*** the company's Ohio tax liability to the extent the business activity facilitated by the new investment creates greater net worth or net income for the company, which increase will then typically be partially offset by the investment tax credit. On the other hand, if the Ohio company decided to locate the new property outside Ohio, once again the decision to expand the company's operations to another state furthers rather than hinders the interests of inter-state commerce. The Ohio company would now be transacting business in at least two states, and would ***apportion*** its franchise and income taxes between those states. O.R.C. § 5733.05(B)(2); *Harsco Corp. v. Tracy*, 85 Ohio St.3d 382, 383 (1999). Thus, by deciding to place the new machinery and equipment outside of Ohio, the Ohio company would be ***lowering*** its Ohio taxes. Furthermore, if the other state has a lower tax rate than Ohio for franchise and income taxes, the Ohio company's decision to locate the

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[10] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-73 (1984).

[11] *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).

[12] *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194-97 (1994).

new investment outside of Ohio would not only lower its Ohio taxes, it would also reduce the company's aggregate tax liability.

The Sixth Circuit's decision below rests on the false premise that the Ohio investment tax credit ineluctably places "golden handcuffs" on Ohio businesses, coercing them to remain shackled to Ohio and discriminating against interstate commerce through economic incentives too desirable to pass up. As the court of appeals erroneously presumed:

> the economic effect of the Ohio investment tax credit is to encourage further investment in-state ***at the expense of development in other states*** and . . . the result is to hinder free trade among the states.

*Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 745 (6th Cir. 2004) (emphasis supplied). This conclusion is demonstrably false as a matter of logic, experience and economic theory. The Sixth Circuit's reasoning that to reward companies for investing in Ohio thereby discourages them from investing elsewhere is founded upon a false syllogism.

Moreover, since only one state would be able to tax a company's new investment of machinery and equipment in its franchise tax base if every state were to adopt the identical franchise tax and investment tax credit, the Ohio investment tax credit is "internally consistent."[13] Importantly, the fact that the reach of a state's regulatory powers and incentive policies properly ends at its own borders should not be confused with the repugnant idea of intrastate protectionism.

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[13] *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). In order to be internally consistent, a tax must not impose a greater burden on interstate commerce than on intrastate commerce if it were assumed to be imposed by every state. This test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* at 183.

The Ohio investment tax credit is not rendered unconstitutionally protectionist merely because it does not reward investments made outside of Ohio. Other states remain free to reward, ignore, or even penalize similar investment activity within their own borders.

It is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385 (1991). It is likewise explicitly clear that the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). As Justice Stevens observed, the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring).

The only type of investment tax credit that could violate the dormant commerce clause is one that discriminates against out-of-state activities or actors in favor of their in-state competitors. *See Bacchus*, 468 U.S. at 272 ("a State may not tax interstate transactions in order to favor local businesses over out-of-state businesses"). No such discrimination is posed by the Ohio investment tax credit, which taxes only intrastate transactions.

Declaring a statute unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Given the serious flaws in the economic analysis and constitutional reasoning of the decision below, this Court should reject the Sixth Circuit's significant encroach-

ment on "laudatory" state prerogatives to design their tax systems "to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp.*, 498 U.S. at 385. The Ohio investment tax credit properly fulfills that goal and should be upheld.

## CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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IN THE

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**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* FISCAL POLICY INSTITUTE, CONNECTICUT VOICES FOR CHILDREN AND GOOD JOBS FIRST IN SUPPORT OF RESPONDENTS

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**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## BRIEF OF *AMICI CURIAE* FISCAL POLICY INSTITUTE, CONNECTICUT VOICES FOR CHILDREN AND GOOD JOBS FIRST IN SUPPORT OF RESPONDENTS

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## IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

The Fiscal Policy Institute is a nonprofit, nonpartisan research and education organization with offices in Latham, New York and New York, New York. Since its establishment 13 years ago, the Fiscal Policy Institute (FPI) has

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[1] This brief is filed in accordance with the global consent letters filed by petitioners and respondents with this Court. Pursuant to Supreme Court Rule 37.6, the Fiscal Policy Institute, Connecticut Voices for Children and Good Jobs First state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

worked to increase public and governmental understanding of issues related to the fairness of New York's tax system and the stability and adequacy of state and local public services.

While the states "may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes" (*West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n. 15 (1994)), FPI is concerned that in recent decades the states have been increasingly competing for economic activity through the use of tax incentives and credits that discriminate against interstate commerce. From a public policy perspective, FPI is concerned that these discriminatory approaches divert resources from the types of state activities (such as "maintaining good roads, sound public education, or low taxes") that are permissible under the Commerce Clause and that are much more likely to result in increases in the overall amount of economic activity in the country.

FPI believes that the decision of the Sixth Circuit in this case, if upheld by the Supreme Court, would help to de-escalate the "economic war among the states" that is currently being played out in ways that are inconsistent with the Supreme Court's Commerce Clause jurisprudence.

Connecticut Voices for Children ("Voices") is a not-for-profit organization that seeks to promote the well-being of all of Connecticut's young people and their families by advocating for strategic public investments and prudent public policies. Voices advances its mission, among other ways, through high quality research and analysis.

For the last nine years, the work of Voices has included analyses of state fiscal policies, including how the state of Connecticut spends its money and how it raises its money. Voices is concerned that the state is not making the strategic investments in children and families—including education and health care—that are necessary for personal well-being as well as for Connecticut's economic future. At the same time, Voices

is aware of an increasing use of business tax expenditures that deprive the state of much-needed revenues, create an unbalanced playing field that favors large, multi-state and multinational corporations over local, small businesses (which, as a category, are the acknowledged drivers of our state economy), and which are enacted into law without adequate assessment of any immediate or ongoing benefits to the state.

Good Jobs First is a non-profit, non-partisan research and education organization based in Washington, D.C. with offices in New York, New York and Chicago, Illinois. Good Jobs First seeks to promote greater accountability in state and local economic development programs and deals by tracking the adoption of reforms such as deal-specific disclosure of costs and benefits, job quality standards (wage and healthcare requirements), clawbacks (recapture provisions for deals that fall short on jobs or other promised benefits), and budgeting reforms such as Unified Development Budgets (to encourage more awareness of costly but poorly understood tax incentive expenditures).

Good Jobs First has generated research reports and a book (*The Great American Jobs Scam: Corporate Tax Dodging and the Myth of Job Creation*) that conclude that state-enabled economic development subsidies like those at issue in *Cuno*—usually justified in the name of interstate competition for jobs and tax base—have so proliferated as to create many unintended consequences that are antithetical to the goals of authentic economic development and injurious to businesses that are not able to exploit the "economic war among the states." These include: less opportunity for low-income communities most in need of reinvestment; a regressive tax burden shift; a serious national infrastructure deficit; insufficient support for workforce development; and a decline in funding for public education.

## SUMMARY OF ARGUMENT

1. There is a strong public policy rationale for recognizing respondents' standing to bring suit. In spite of the Commerce Clause, almost all states have enacted, as a key weapon in their economic competition, discriminatory tax legislation that provides in-state businesses a direct competitive advantage and burdens interstate commerce. Such legislation is rarely challenged, however, because, on the whole, the tax benefits derived by multi-state corporations from the proliferation of tax incentives far outweigh the costs of any discrimination those corporations may suffer in particular instances, and a challenge to a tax incentive denied by one state might put at risk the tax breaks received in other states. As a consequence, large multi-state corporations have a huge stake in maintaining the status quo. The primary victims of the proliferation of targeted business tax incentives are other taxpayers in the state and locality who face higher tax burdens and/or reduced government services. These victims should therefore have standing to challenge the constitutionality of state business tax incentives to protect their own, directly impacted economic interests, and in doing so, the interests of the national economy as well.

2. Ohio's investment tax credit discriminates on its face against out-of-state manufacturers subject to the State's corporate income tax. As a result of the credit, manufacturers with production facilities in Ohio face a lower effective tax rate under Ohio's corporate income tax than manufacturers whose manufacturing operations are outside the State, providing a direct commercial advantage to in-state manufacturers. This difference in tax burden is due solely to the difference in the situs of the taxpayers' production facilities. Such discrimination, apparent on the face of the statute, is virtually *per se* invalid under well-established Supreme Court Commerce Clause jurisprudence.

3. The structural framework of a state corporate income tax, including Ohio's, requires that the calculation of tax liability take into account a taxpayer's activities both within and outside the state. This calculation includes, for example, deductions for wages and other expenses incurred both within and outside the state, as well as allowable depreciation for property both within and outside the state. As a consequence, when these rules regarding deductible expenses and allowable depreciation make distinctions between in-state and out-of-state property, favoring the former over the latter, they violate the Commerce Clause. Similarly, Ohio may not provide an investment tax credit for in-state manufacturing property while providing no corresponding credit for out-of-state manufacturing property without running afoul of the Commerce Clause.

4. A ruling upholding the constitutionality of Ohio's investment tax credit would undoubtedly lead to an escalation by the states in the discriminatory tax treatment of out-of-state businesses.

5. The specific intent of the Commerce Clause is to preclude the states from engaging in exactly the kind of parochial, discriminatory economic policies exemplified by Ohio's investment tax credit, which undermine the goal of a national common market. While the precise reach of the Commerce Clause is a subject of debate, the authority and responsibility of the Court to strike down discriminatory state tax schemes designed to favor in-state activity is beyond question.

6. The public welfare would be better served by the prohibition of the use of discriminatory business tax incentives than by their continued proliferation. Targeted business tax incentives are largely ineffective as a policy tool; their widespread use instead reflects such factors as political expediency, the political power and influence of large corporations, and purposeful discrimination in favor of in-state

activity. Because the states have at their disposal a broad array of public policies, including tax policies, that they may pursue to promote economic development in ways that do not run afoul of the Commerce Clause, they would not suffer any hardship if the use of the limited set of discriminatory tax incentives at issue in this case were no longer available to them.

## ARGUMENT

### I. There Is a Strong Public Policy Rationale For Recognizing Respondents' Standing to Bring Suit. The Primary Victims of the Proliferation of Targeted State and Local Business Tax Incentives are Taxpayers Ineligible for Preferential Tax Treatment Who Face Increased Tax Burdens and/or a Reduced Level of Government Services.

The central purpose of the Commerce Clause[2] was to establish a national economy and protect it from harm resulting from discriminatory state economic policies designed to favor in-state business interests and prejudice interstate and foreign commerce.[3]

The current economic competition among the states is reminiscent of their behavior under the Articles of Confederation. Moreover, in spite of the presence of the Commerce Clause, most states have enacted, as a key weapon in this war among the states, discriminatory tax legislation

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[2] U.S. Const. art I, § 8.

[3] See e.g. Boris I. Bittker, *On The Regulation of Interstate and Foreign Commerce*, 1-4 (1999); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977).

designed to favor in-state business activities.[4] Yet such legislation has rarely been challenged.

One reason out-of-state businesses denied a state tax incentive rarely bring suit is that a successful suit is unlikely to result in the out-of-state business receiving the tax benefit provided to in-state businesses. Instead, the taxing state is likely to repeal the benefit provided to in-state businesses. For example, if Ohio's investment tax credit is found unconstitutional, it is unlikely the State would extend the credit to qualifying out-of-state investments. Instead, since a revised credit available to all manufacturers would result in the loss of significant additional revenue and would no longer give in-state businesses a competitive advantage, Ohio would almost certainly remedy the discrimination by doing away with the credit provision. Thus, while out-of-state competitors might be able to "level the playing field" by bringing suit, they would not be able to reduce their tax liability in the taxing state. This outcome may not be of sufficient benefit to merit the time and expense of litigation.[5]

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[4] Not all of these discriminatory tax provisions are corporate income tax incentives similar in kind to Ohio's investment tax credit. For example, New York State exempts from its petroleum business tax airlines that service four or more cities in the State with direct non-stop flights between these cities (N.Y. Tax Law § 301-e (McKinney's 2006)). In addition, New York exempts from the excise tax on beer the first 200,000 barrels brewed and sold in the State each year (when first enacted in 1989, the provision exempted 100,000 barrels annually) by a distributor whose principal executive office is located within the State (N.Y. Tax Law § 424(b) (McKinney's 2006); New York Chapter Laws, L.1989 c.61).

[5] The New York State tax legislation in favor of certain in-state beer businesses noted in footnote 4, *supra*, specifically provides that: "if the exemption from tax . . . as added by section seventy-two of this act, shall be declared unconstitutional such judgment of invalidity shall not result in the extension of the exemption to out of state distributors who are brewers, but shall result only in the denial of such exemption to all distributors who are brewers." (New York Chapter Laws, L. 1989 c. 61 § 364).

More importantly, discriminatory corporate income tax incentives go largely unchallenged because the cumulative tax benefits derived by multi-state corporations from the proliferation of corporate income tax incentives far outweigh the costs of any discrimination such corporations may suffer in particular instances. A challenge to the constitutionality of an incentive denied to a corporation in one state may put at risk the tax incentives from which it benefits in other states. The existing state of affairs works to the great advantage of large multi-state corporations,[6] and they have little desire to "rock the boat." The ferocity of the corporate response to the Sixth Circuit decision in this matter is testimony to the huge stake large multi-state corporations have in maintaining the status quo.

The primary victims of the states' widespread use of targeted business tax incentives are not out-of-state corporate competitors but other taxpayers, who must pay more than their fair share to support state and local government or face reduced public services because powerful and influential corporations have sought and obtained preferential treatment. This shift in tax burden is well-documented.[7]

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[6] A study of the corporate income taxes of 20 states over the period 1990-1998 by University of Iowa economist Peter Fisher concludes that as a result of the increasing availability of tax incentives, the effective corporate tax rate on manufacturing companies in these states fell by 30% during the period. Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 42 State Tax Notes 767 (2002).

[7] During the most recent 25-year period for which data are available (1979-2004), the corporate income tax fell from 10.2% to 5.6% of total state tax revenue in the states imposing corporate income taxes. U.S. Census Bureau, State Tax Collections (1979-2004).

The average effective state-local corporate income tax rate has been gradually declining since the mid-1980s. Congressional Research Service Report for Congress, *Average Effective Corporate Tax Rates: 1959 to 2002*, p. 6 (September 5, 2003).

In *Kelo v City of New London*,[8] this Court addressed the constitutionality of the use of the power of eminent domain by the states in the name of economic development. Both the majority and dissenting opinions in *Kelo* express concern for the potential misuse by government of its power of eminent domain, purportedly to promote economic development, to further powerful private interests at the expense of the general welfare.[9] Justice O'Connor's dissenting opinion explicitly warns that the inevitable fallout from the broad exercise of the taking power in the name of economic development will be that those with power and influence in the political process will benefit, while those with fewer resources and less influence will be victimized.[10]

The same misuse and abuse of the public trust is not just inevitable in the states' use of targeted business tax incentives—it is business as usual in many state capitols.[11] While the victims of states' misuse of the taxing power may not stand out as starkly as the victims of the government's misuse of the taking power, they are victims nonetheless.

Finally, a ruling in this matter that failed to address the important constitutional question before the Court would result in a continuing cloud of uncertainty for both state governments and multi-state businesses regarding the validity of tax statutes on the books providing targeted business tax incentives in almost every state in the union. This uncertainty, in turn, because it makes business decisions more difficult to make, could damper economic activity, an outcome that serves no one's interests.

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[8] *Kelo v City of New London*, 125 S. Ct. 2655 (2005).

[9] *Id.*, at 2661-62, 2665-68, 2674-77.

[10] *Id.*, at 2677.

[11] See *infra*, Part IV, which addresses, *inter alia*, the political power and influence of large corporations as a factor in the proliferation of targeted business tax incentives.

Consequently, respondents should not be denied standing, particularly at this late stage, to challenge Ohio's investment tax credit to protect their own, directly impacted economic interests, and in doing so, the interests of the national economy as a whole.

## II. Ohio's Investment Tax Credit is Discriminatory on its Face and Burdens Interstate Commerce in Violation of the Commerce Clause.

### A. Ohio's Investment Tax Credit Discriminates on its Face Against Out-of-State Manufacturers Subject to Ohio's Corporate Income Tax.

Despite the ardent assertions of petitioners to the contrary, the investment tax credit provision of Ohio's corporate income tax is clearly discriminatory on its face, imposing differential tax treatment on in-state and out-of-state economic interests that benefits the former and burdens the latter, providing a direct commercial advantage to local businesses. This Court has consistently held that such discrimination violates the Commerce Clause.[12] It does so even under the most favorable set of facts for its proponents, which presumes the credit successfully attracts new investment from outside the state. The following example illustrates:

> Assume XYZ Corp. ("XYZ") and PQR Corp. ("PQR") are identical in every respect. Both are manufacturers with facilities in State B. Both sell their products in State A. Neither has manufacturing facilities there. Both are subject to State A's corporate income tax, and both face the same annual tax liability of $1 million. State A, seeking to attract manufacturing activity, adopts an investment tax credit under its corporate income tax

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[12] *Oregon Waste Sys. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994); *Boston Stock Exch., supra*, 429 U.S. at 329; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984).

equal to 7.5% of the cost of production machinery and equipment placed in service within the state. No more than one-seventh of the total credit amount earned may be claimed in a given year. XYZ, motivated by the incentive, abandons its manufacturing facility in State B and invests $100 million in a new facility in State A. PQR chooses to continue manufacturing its products in State B. All other variables remain constant.

As a result of its investment, XYZ earns $7.5 million in tax credits, and claims one-seventh of that credit in each of the next seven years, eliminating its tax liability in each of those years.[13] PQR continues to pay $1 million each year in corporate income tax to State A, a total of $7 million. XYZ's lower tax burden provides a direct commercial advantage to XYZ over PQR in selling its products in State A. XYZ's lower tax burden is due solely to the in-state location of its manufacturing facility.

The petitioners focus their attention on refuting the allegation that Ohio's investment tax credit discriminates against

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[13] Ohio's corporate income tax business income allocation formula includes payroll and property factors. Assuming State A's formula were identical to Ohio's, XYZ's new facility in State A would increase XYZ's property and payroll factors in State A, which would in turn increase the share of XYZ's total income apportioned to State A and consequently increase XYZ's tax liability in State A (without regard to any credit). The operation of State A's apportionment formula would thus serve to offset, in some amount, the benefit of the investment tax credit claimed by XYZ. While it is correct that Ohio's corporate income tax business income allocation formula operates in this fashion, this fact has no constitutional significance. This Court has made abundantly clear in prior cases that Ohio cannot, under the facts presented, assert that its investment tax credit is a valid compensatory tax (See *Fulton v. Faulkner*, 516 U.S. 325 (1996), setting out the stringent test a facially discriminatory tax must meet to qualify as a constitutionally valid compensatory tax). Further, Ohio's use of a three-factor formula including payroll and property is a choice of its own making. Ohio is free to adopt a single-factor sales apportionment formula, under which new investment in Ohio would not, in and of itself, increase the investing corporation's Ohio income allocation percentage.

capital investment made outside Ohio. While such discrimination is indeed present, the fundamental discrimination inherent in Ohio's investment tax credit, as demonstrated above, is far more straightforward. As the example illustrates, the discrimination puts out-of-state manufacturers doing business in and subject to corporate tax in Ohio at a competitive disadvantage vis-a-vis in-state manufacturers doing business in Ohio. This Court has, as a matter of course, struck down state tax provisions that discriminate in this fashion.[14]

Petitioners argue that both XYZ and PQR had an equal opportunity to invest in State A and benefit from the investment tax credit, and therefore there is no discrimination. This argument is specious. It is irrelevant for constitutional purposes that both corporations had the opportunity to locate their facilities in State A. Businesses located in one state are always free to relocate to another. A state may not, however, discriminate against a business because it chooses to conduct its operations elsewhere.[15]

Nothing in this argument is meant to suggest that states may not entice businesses to relocate by offering tax breaks; they certainly may.[16] What states may not do to encourage in-state economic activity is to bestow a direct commercial advantage to in-state businesses by taxing them more favorably than their out-of-state counterparts based solely on the

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[14] See e.g. *Westinghouse Elec. Corp. v Tully*, 466 U.S. 388, 404 (1984); *Boston Stock Exch., supra*, 429 U.S. at 329; *Oregon Waste Sys., supra*, 511 U.S. at 99.

[15] See e.g. *Boston Stock Exch., supra*, 429 U.S. at 334-335; *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (striking down an Ohio statute that provided a tax credit for sales of ethanol produced in Ohio but not in certain other states).

[16] *Boston Stock Exch., supra*, 429 U.S. at 337; *Bacchus Imports, supra*, 468 U.S. at 271;

situs of their activities.[17] Ohio's investment tax credit does precisely this, and is therefore virtually *per se* invalid.[18]

### B. Because the Calculation of State Corporate Income Taxes Takes Into Account the Business Activities of Taxpayers Carried on Both Within and Without the State, Any Provision Within These Taxes That Treats Out-of-State Business Activity Less Favorably Than In-State Business Activity Based Solely on the Location of that Activity Unconstitutionally Discriminates Against Interstate Commerce.

A Commerce Clause tax discrimination issue faced by tribunals in New York and Wisconsin highlights the discrimination inherent in Ohio's investment tax credit statute.

Under the structural framework of a state corporate income tax, including Ohio's, tax is imposed on an apportioned share of the income earned by a corporation from its business activities conducted both within and outside the state. The calculation of state income generally uses some version of federally reported income as its starting point. This federal figure reflects, among other items, deductions for allowable depreciation of property located both within and outside the taxing state.[19] Federal depreciation rules make no distinction based on the state in which property is located. As a result, state corporate income taxes generally do not impose different depreciation rules for in-state and out-of-state property.

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[17] *Boston Stock Exch., supra*, 429 U.S. at 329; *Bacchus Imports, supra*, 468 U.S. at 273; *Westinghouse Elec. Corp., supra*, 466 U.S. at 404.

[18] *Oregon Waste Sys., supra*, 511 U.S. at 99; *Fulton, supra*, 516 U.S. at 331.

[19] Ohio Rev. Code § 5733.04

In 1981, the federal Economic Recovery Tax Act (ERTA)[20] was enacted. Among other provisions, ERTA adopted new depreciation rules. The new depreciation provisions, contained in I.R.C. §168, which allowed taxpayers to accelerate deductions under rules known as ACRS (Accelerated Cost Recovery System), were more generous than the former rules set out in I.R.C. §167. Subsequently, New York State, New York City and the State of Wisconsin, concerned with the potential loss of revenues, enacted provisions in their corporate income taxes that provided accelerated depreciation under I.R.C. § 168 for property placed in service within the taxing state while imposing the less favorable depreciation rules of I.R.C. §167 for out-of-state property.[21] New York City's statute and Wisconsin's statute were both challenged, and both were found unconstitutional.[22]

Citing *Oregon Waste Systems v. Department of Environmental Quality* and *Fulton v. Faulkner*, the New York appellate court struck down New York City's depreciation provisions as unconstitutional, concluding that these provisions were discriminatory on their face; that they had the practical effect of discriminating against taxpayers doing business in New York City who had commercial property located outside of the State of New York; and that this unequal treatment resulted solely from the situs of their activities.[23] The Wisconsin Tax Appeals Commission reached the same result, concluding that the effect of the depreciation

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[20] Pub. L. 97-34, 95 Stat. 172 (1981)

[21] Former NYC Admin. Code §§ 11-602(8)(b)(11), 11-602(8)(j), 11-602(8)(a)(10); Former Wis. Stat §§ 71.04(15)(a), 71.04(15)(b), 71.26(2)(a), 71.26(3)(y).

[22] *Beatrice Cheese v. Wisconsin*, 1993 Wis. Tax LEXIS 5 (Wis. Tax App. Comm'n, 1993); *R.J. Reynolds v. City of N.Y.*, 237 A.D.2d 6 (1997) appeal dismissed 91 N.Y.2d 956 (1998).

[23] *R.J. Reynolds, supra*, 237 A.D.2d at 13.

provisions was "to impose a higher franchise tax burden on a business solely because some or all of its depreciable property is located outside rather than inside [the State, which] is clearly facial discrimination against interstate commerce."[24]

There is very little to distinguish the tax consequences of the depreciation provisions struck down in New York and Wisconsin from those of Ohio's investment tax credit. Those depreciation provisions granted more favorable income tax treatment to property placed in service in the taxing state than property placed in service outside the state. Ohio's investment tax credit, in the form of a credit against tax due rather than a deduction from income, achieves precisely the same result. It grants more favorable tax treatment to manufacturing property placed in service in Ohio than it does to manufacturing property placed in service outside Ohio, resulting in a lower effective tax rate for in-state manufacturers solely because of the situs of their manufacturing facilities.[25]

The discrimination inherent in the depreciation provisions adopted by New York City and Wisconsin is self-evident. The statutes explicitly provided one set of depreciation rules for in-state property and another set for out-of-state property, and treated the former more favorably than the latter. The statutes provided a double standard in favor of in-state activities for all to see. The forbidden discrimination all but jumped off the page.[26]

Ohio's investment tax credit statute, in contrast, makes no mention of out-of-state property.[27] This makes the discrimination less obvious. But, as described above, state corporate

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[24] *Beatrice Cheese, supra*, 1993 Wis. Tax LEXIS at 7.

[25] See e.g. *Westinghouse Elec. Corp., supra*, 466 U.S. at 388.

[26] *Oregon Waste Sys., supra*, 511 U.S. at 99; *Fulton, supra*, 516 U.S. at 331.

[27] Ohio Rev. Code § 5733.33.

income taxes are imposed on an apportioned share of the income derived from a taxpayer's activities both within and without the taxing state. Consequently, state corporate income tax provisions must address, either explicitly or implicitly, both the in-state and out-of-state activities of taxpayers. Ohio's calculation of corporate income tax includes, among other items of income and expense, deductions for wage expenses incurred both within and outside Ohio, as well as depreciation rules that apply to both in-state and out-of-state property.[28]

The credit provisions of a state corporate income tax are no different from other provisions within such tax - they must address both the in-state and out-of-state business activities of taxpayers. When they fail to do so explicitly, they do so implicitly, by their silence. In other words, appropriately restated, Ohio's investment tax credit provides as follows: qualifying in-state investment receives a 7½% (or 13%) credit; otherwise qualifying out-of-state investment, based solely on the fact it is located out-of-state, receives a 0% credit. This blatant discrimination, providing in-state businesses a commercial advantage, is patently unconstitutional.[29]

Viewed differently, if Ohio's investment tax credit scheme were constitutional, then a statute that provided a 7% credit for qualifying in-state investment and a 3% credit for qualifying out-of-state investment, certainly more favorable to out-of-state corporations than no credit at all, would be constitutional as well. Yet the impermissible discrimination inherent in this hypothetical statute is self-evident. In short,

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[28] Ohio Rev. Code § 5733.04. Petitioner DaimlerChrysler Corporation asserts in its brief (p. 24) that "Ohio does not place a financial burden on out-of-state capital investment. Rather, because Ohio's corporate franchise tax levies only against business value in Ohio, a corporation's out-of-state investment is essentially Ohio-tax-free." As the discussion above demonstrates, this assertion is untrue.

[29] *Boston Stock Exchange*, *supra*, 429 U.S. at 329.

Ohio's investment tax credit statute can only be read to grant, on its face, preferential treatment to in-state investment that provides a direct commercial advantage under the state's corporate income tax to in-state businesses. The credit is therefore *per se* invalid.[30]

If the Court were to rule that Ohio's investment tax credit is constitutional, would this ruling validate the use by states of more favorable depreciation rules for in-state property than out-of-state property? If it would not, what constitutional principle would distinguish the use of an income tax credit from the use of an income tax deduction? If states may in fact provide more favorable depreciation rules for in-state property, may states also provide one-year expensing of in-state property, while out-of-state property remains subject to depreciation?[31] May states allow a corporate income tax deduction equal to twice the wages paid to in-state employees, but not out-of-state employees? A ruling upholding Ohio's investment tax credit would undoubtedly encourage the states to test these waters.

The correct and better result, fully consistent with existing precedent, is that Ohio's investment tax credit is unconstitutional.

## III. The Central Purpose of the Commerce Clause Is to Preclude Precisely the Kind of Parochial, Discriminatory State Economic Policies Exemplified By Ohio's Investment Tax Credit.

The immediate impetus for replacing the Articles of Confederation with the Constitution was the need for eco-

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[30] *Oregon Waste Sys.*, *supra*, 511 U.S. at 99; *Fulton*, *supra*, 516 U.S. at 331.

[31] New York Governor George E. Pataki has recently proposed legislation that would do just this. See New York State 2006-2007 Executive Budget, Article VII Revenue Bill, Part I, available at http://publications.budget.state.nt.us/fy0607artVIIbills/REVENUE.HTM.

nomic unity, unhampered by discriminatory and retaliatory state reprisals against commerce from other states and countries.[32] The Articles of Confederation had reserved to the states, not Congress, the power to regulate foreign and interstate commerce, a framework that proved unworkable as states continued their economic warfare, carried on through tariffs and duties.[33] With each state "free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents . . . a conflict of commercial regulations, destructive to the harmony of the states ensued."[34]

The states remain free under the Commerce Clause to engage in economic competition with one another by seeking to make their tax regimes more favorable for business activity than their neighboring states.[35] A state, for example, may choose to impose its corporate franchise tax at a low rate, or impose no corporate income tax at all. Alternatively, a state may provide a broad exemption from its sales and use tax for business inputs. States are also free to compete through the use of their spending powers—on public infrastructure, public education, public health and safety, and so on.

What a state may not do—what the Commerce Clause was specifically intended to preclude—is to engage in discriminatory economic policies, including tax policies, that grant a direct commercial advantage to in-state business activity and undermine the goal of a national common market.[36] Such policies include taxes that impose differential tax treatment

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[32] Wiley Rutledge, *A Declaration of Legal Faith*, 25 (1947).

[33] John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 158-60 (6th ed. 2000)

[34] *Camps New Found./Owatonna, Inc. v. Town of Harrison*, 502 U.S. 564, 571 (1997).

[35] *Boston Stock Exch., supra*, 429 U.S. at 336-337; *Bacchus Imports, supra*, 468 U.S. at 271.

[36] *Boston Stock Exch., supra*, 429 U.S. at 329, citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959).

on in-state and out-of-state economic interests that benefit the former and burden the latter.[37] The Ohio investment tax credit does exactly this, undermining a central purpose of the Commerce Clause and the Court's negative Commerce Clause jurisprudence.[38]

While the precise reach of the Commerce Clause is a subject of some debate, the authority and responsibility of the Court to strike down facially discriminatory state tax legislation is beyond question.[39]

## IV. The Public Welfare Would be Better Served by the Prohibition of the Use of Discriminatory Tax Incentives Than By Their Continued Proliferation. Targeted Business Tax Incentives Are Ineffective as a Policy Tool. Their Widespread Use Instead Reflects Such Factors as Political Expediency, the Political Power and Influence of Large Corporations, and Purposeful State Discrimination in Favor of In-State Business Activities. A Prohibition Against the Use of a Limited Set of Discriminatory Tax Incentives Would Not Impose Any Hardship on the States. States Have at Their Disposal a Broad Array of Public Policies They May Pursue to Promote Economic Growth and to Compete for Favorable Business Activities Such as Manufacturing, Including Tax Policies.

The public welfare of the states individually and of the nation as a whole would be better served by the prohibition of the use of discriminatory tax incentives such as Ohio's investment tax credit than by their continued proliferation.

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[37] *Oregon Waste Sys., supra*, 511 U.S. at 99.

[38] *Camps New Found. Owatonna, Inc., supra*, 520 U.S. at 571.

[39] *Boston Stock Exchange, supra*, 429 U.S. at 329.

The states have at their disposal a broad array of public policies, including tax policies, they may pursue to promote economic growth generally, and, if they choose, to compete directly with other states for certain favored business activities such as manufacturing. With respect to tax policies, states may, under the Commerce Clause, tax corporate income at low rates, or not at all, exempt most business inputs from sales tax, or unconditionally exempt certain industry sectors from real property tax. States may also choose to compete through the use of their spending powers—on public infrastructure and public education, for example. All of these policies might serve to improve a state's business climate. None raises constitutional concerns.

Most states have chosen, however, to make targeted business tax incentives the central component of their economic development strategies, and their use has proliferated over the past decades.[40] This widespread and growing use of targeted business tax incentives is not, however, an indicator of their success as a public policy tool. To the contrary, several decades of research and analysis point to the conclusion that these incentives are largely ineffective.[41] The persistent

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[40] See e.g. Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev 377, 382-389 (1996). New York currently offers over two dozen different credits under its corporate franchise tax (N.Y. Tax Law § 210 (McKinney's 2006)).

[41] See e.g. Robert G. Lynch, *Rethinking Growth Strategies: How State and Local Taxes and Services Affect Economic Development*, Economic Policy Institute (2004), which reviews the findings of hundreds of studies examining the effects of state and local tax incentives and concludes that these incentives are largely unsuccessful in stimulating economic activity and creating jobs in a cost-effective manner.

Robert Ady, a prominent site location consultant, concluded:

> "[I]n the facility location process, taxes are not relatively important when compared with other cost factors such as labor, transportation and utility and occupancy costs. . . . In summary, site selection data

growth in their use is attributable instead to a variety of other factors, some relatively benign, others more insidious.

First, businesses championing targeted business tax incentives offer public officials a very attractive proposition—that the targeted business tax incentives that they are advocating will create new jobs and improve the state's economy. Elected officials are thus presented with a win-win-win opportunity under which the citizens win increased job opportunities, the targeted businesses win higher profits, and the elected officials win both business and popular support. Sometimes, the incentives are even advertised as being able to "pay for themselves," allowing the positive outcomes listed above to be accomplished without any reduction in the state revenues needed for public education and other state responsibilities-yet another "win."

If it all sounds almost too good to be true, that's because it is. It's just wishful thinking. As previously noted, a wealth of studies show that targeted business tax incentives have not worked effectively.[42] Nonetheless, many governors and state legislators are frequently seduced by this pitch for targeted business tax incentives because it offers easy answers to difficult public policy issues. In turn, they frequently make this pitch themselves.

Second, even if elected officials suspect that targeted business tax incentives may not work as promised, these officials may often be as interested in the symbolic content of their actions as in their concrete effects. By creating the appearance of being-

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do not suggest any correlation between low taxes and positive economic growth, or between high taxes and slow growth. The location requirements are too many, the process too complicated, and other factors too important to justify a strong relationship." Robert Ady, *Discussion*, New England Economic Review, March/ April 1997, at 77.

[42] See e.g. Lynch, *supra*, note 41.

proactive in pursuit of economic growth, they can take credit for subsequent economic successes, whatever their actual causes, and avoid most of the blame they might otherwise receive for any bad economic news that befalls the state.[43] Stated more cynically, elected officials genuinely wish to implement policies that will have a positive impact on their state's economy. But, as a close second choice, they desperately wish to take action that gives that appearance.

Third, targeted tax incentives offer state officials a particularly convenient mechanism for the delivery of benefits to private businesses in their state. Because these tax breaks involve a reduction of public revenues rather than an appropriated expenditure of public funds, they do not directly compete with other programs for scarce budget resources. In addition, the likely loss in state revenues from tax incentive legislation is generally difficult to predict, and may well be understated by its proponents, purposefully or otherwise. Indeed, many proponents of tax incentives make the argument that adopting a particular incentive will not result in *any* loss of state revenues—the incentive will "pay for itself" as a result of the increased economic activity it generates.

Further, even in those instances where a reasonable estimate of the cost of a targeted tax incentive is available, the distribution of the tax benefits within the targeted industry is almost always hidden. This lack of information facilitates the enactment of tax incentives that may deliver the lion's share of their benefits—sometimes tens of millions of dollars—to a handful of large corporations.[44] Such largesse

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[43] As one sociologist summarized the phenomenon after studying the mentality of economic development officials, "shoot anything that flies; claim anything that falls." Herbert Rubin, quoted in *Conversations With Economic Development Practitioners*, Economic Development Quarterly, at 237 (1988).

[44] New York State provides an investment tax credit (ITC) for investments in manufacturing property located in New York, accompanied

might not be politically feasible if this information were public.[45]

Additionally, once on the books, tax incentives generally remain there. They almost never require annual reauthorization, and are rarely subject to any kind of programmatic evaluation of their costs and benefits.[46] All of these attributes make targeted tax incentives a far more attractive policy tool than direct subsidies for both businesses seeking favored treatment and elected officials granting such treatment.

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by an add-on employment incentive credit (EIC) for corporations claiming an ITC whose employment has increased by at least 1%. A study published in 1985 by a legislative tax study commission constitutes the only serious evaluation of these credits undertaken since the ITC was first enacted in 1969. Some of the results are striking. For example, in 1982, five corporations claimed 35% ($47.9 million) of the total ITC claimed. Similarly, just five corporations claimed 45% ($24.2 million) of the total amount of EICs claimed. New York State Legislative Commission on the Modernization and Simplification of Tax Administration and the Tax Law, *The New York Investment and Employment Tax Credits* (Staff Report March 11, 1985), as cited in Richard D. Pomp, *Reforming a State Corporate Income Tax*, 51 Alb. L. Rev. 375, 632 (1987).

[45] The corporate business community has vehemently opposed measures proposed in a handful of states to make public certain information contained in the state corporate income tax returns of publicly traded corporations, such as the tax benefits received from targeted tax incentives. See e.g. Robert Tannenwald, *Corporate Tax Disclosure at the State Level: The Massachusetts Experience*, Federal Reserve Bank of Boston (2003). Robert P. Strauss, *State Disclosure of Tax Return Information: Taxpayer Privacy vs. The Public's Right to Know*, 5 State Tax Notes 24 (1993); Richard D. Pomp, *Corporate Tax Policy and the Right to Know: Enhancing Legislative and Public Access*, 6 State Tax Notes 603 (1994); Robert P. Strauss, *The Political Economy of Business Tax Return Policy*, 8 State Tax Notes 873 (1995); Richard D. Pomp, *The Political Economy of Tax Return Privacy - Revisited*, 8 State Tax Notes 2389 (1995); Robert Tannenwald, et al, *Corporate Tax Disclosure: Good or Bad for the Commonwealth*, 5 State Tax Notes 32 (1993).

[46] Sara Hinkley and Fiona Hsu, *Minding the Candy Store: State Audits of Economic Development*, Good Jobs First, September 2000.

Fourth, the states, unless checked by federal restraints, will pursue their parochial economic interests without regard to the consequences for the national economy. From a single state's perspective, the use of targeted corporate tax incentives may be perceived as an efficient strategy for pursuing its own narrow economic interests. First, they provide a (discriminatory) competitive advantage to in-state corporations over their out-of-state counterparts. In addition, because these incentives are granted for in-state activity only, they are perceived as providing a state with more economic development "bang for the buck" than other tax measures, such as a corporate tax rate reduction, which benefits both in-state and out-of-state corporations.

From a national perspective, of course, this "efficiency" is purposeful discrimination that burdens interstate commerce and hurts the national economy. Nonetheless, the states will continue to use discriminatory corporate income tax incentives to pursue their parochial economic interests unless and until they are prohibited from doing so.

Fifth, the abundance of targeted business tax incentives is to a significant degree simply a reflection of the enormous political power and influence wielded in state capitols by large corporations. The misuse of the taxing power on behalf of powerful private interests, cloaked in the mantle of economic development, is all too common. Unlike broad-based, low-rate taxes, higher-rate taxes replete with special provisions are easily engineered to favor those with power and influence. Targeted business tax incentives are thus the vehicle of choice at the state level for directing financial benefits to the most powerful and influential elements of the business community.[47] A tax incentive provision that does

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[47] In his 2001 State of the State message, New York Governor George Pataki exhorted the legislature: ". . . the [corporate] alternative minimum tax sends a very clear message to manufacturers. It says: If you invest in New York, you will be penalized. That is why we've cut that tax in half

not generate a single dollar in additional investment nor create a single new job may nonetheless result in tens of millions in tax savings for large in-state corporations. The following example is illustrative:

> Assume State A imposes a typical corporate franchise tax based on apportioned net income at a rate of 10%. XYZ Corporation ("XYZ") has its main manufacturing facility in State A. The facility is valued at $300 million and employees 500 workers. Routine capital investment

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since 1995. This year, let's finish our work and put the alternative minimum tax in the trash can where it belongs." New York's corporate alternative minimum tax (AMT), imposed at the modest rate of 2.5% in 2001, was enacted in 1987 to ensure that profitable corporations pay at least a modest amount of corporate income tax. (N.Y. Tax Law § 210(1)(c) (McKinney's 2006)). The State's primary tax on corporations is imposed at a rate of 7.5%. (N.Y. Tax Law § 210(1) (McKinney's 2006)). Under this tax, however, corporations, particularly manufacturers, are able to reduce the tax they pay by taking advantage of tax credits that reward certain activities, including investment in plant and production equipment. (N.Y. Tax Law § 210(12)(a) (McKinney's 2006)). These credits may not be used against the AMT. Indeed, that was the intent of the AMT, which was adopted after a legislative study reported that as a result of the State's generous tax credits, some of its largest manufacturers were paying just $250 in corporate tax each year, the statutory minimum. (New York State Legislative Commission on the Modernization and Simplification of Tax Administration and the Tax Law, *The New York Investment and Employment Tax Credits*, Staff Report, March 11, 1985). If the AMT were eliminated, as the Governor proposed, many corporations would be able to use their carryforward credits (over $1 billion in total) under the State's generous fifteen-year carryforward provisions to reduce their tax to the fixed dollar minimum tax every year into the foreseeable future. (New York State Department of Taxation and Finance, Office of Tax Policy Analysis, *Analysis of Article 9-A General Business Corporation Tax Credits For 1999 (2003)*; N.Y. Tax Law § 210(12)(e)(McKinney's 2006)). The AMT was not repealed in 2001 because of the State's deteriorating finances. However, Governor Pataki has called for its repeal again in 2006. (New York State Executive Budget, Article VII Revenue Bill, Section H, available at http://publications.budget.state.ny.us/fy0607artVIIbills/REVENUE.HTM).

averaging approximately $20 million a year is required to keep the facility up and running. XYZ, without tax incentives, pays $1 million annually in corporate franchise tax to State A.

XYZ and other in-state manufacturers approach State A seeking a reduction in their tax payments to State A, asserting that the state's tax structure is undermining their competitiveness and endangering the long-term economic viability of their operations in the State. State A would like to maintain XYZ and the other in-state manufacturers as large employers in the State, and would therefore like to respond positively to their request for lower taxes rather than risk the consequences of failing to do so. Not surprisingly, it would like to do so while minimizing the loss of state tax revenues.

XYZ and other manufacturers with significant plant and equipment in State A ("in-state manufacturers") propose an investment tax credit equal to 10% of the cost of depreciable property used in manufacturing placed in service in State A (but not in other states). State A adopts an investment tax credit that provides: (1) a 10% credit for qualifying manufacturing investment to the extent the amount of such investment exceeds the average investment made in the three prior tax years; and (2) a three-year carryforward provision for unused credits. The State touts the measure by asserting it will increase manufacturing investment and create jobs in the State.

In response to this legislation, XYZ alters its investment pattern, but not its overall investment level. While it continues to average $20 million per year, it adopts a four-year cycle of investment of $10 million in years one, two and three; and $50 million in year four. As a result, it earns a tax credit of $4 million (($50 million - $10 million) x 10%) in year four, eliminating its tax liability for year four and providing a $3 million credit carryforward. These carryforward credits are sufficient

> to eliminate XYZ's tax liability for years five, six and seven, during which years XYZ invests $10 million each year. In year eight, XYZ again invests $50 million, beginning the cycle of credits and carryforward credits once again. Under these facts, XYZ would eliminate its corporate tax liability in year four and every year thereafter, even though its investment in State A has not increased. Nonetheless, both XYZ and state officials cite the incentive as a key piece of the state's economic development strategy, and the State never undertakes a true programmatic evaluation of its costs and benefits that might prove otherwise.[48]

In short, while targeted tax incentives may be unsuccessful as public policy, they result in significant financial gains for the incentive-eligible businesses and in obvious political benefits for the elected officials who, in the name of economic development, promote them. In light of this powerful dynamic, whether targeted tax incentives "work" or not as public policy is often beside the point.[49]

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[48] In New York State, of the corporations claiming the ten largest amounts of investment tax credits for 1982 ($57.5 million among the ten), six had enough credits to reduce their tax to the minimum $250. Yet seven of these ten corporations could not claim the employee incentive credit, which required an increase of a mere 1% or more in New York employment. Overall, 83% of the corporations claiming an investment tax credit in 1982 did not increase their New York employment by even 1%. Pomp, *supra*, note 44, at 636.

[49] New York State has in place an Empire Zone program offering generous tax incentives that was originally designed to promote economic development in economically depressed areas. Over time, the program evolved into a more general economic development program, with tax benefits often available to businesses that are not located in depressed areas. The program is run by the Empire State Development Corporation (ESDC), headed by Charles A. Gargano. Governor Pataki has touted the Empire Zone program as "the best program in America." Yet, according to data provided by the ESDC itself, New York granted $300 million in tax benefits in 2002 to businesses that had reported the creation of 4,000

The public welfare would certainly be better served if the states abandoned targeted business tax incentives as the key component of their economic development efforts.[50] Targeted business tax incentives are largely ineffective as a policy tool; their widespread use instead reflects such factors as political expediency, the political power and influence of large corporations, and purposeful discrimination in favor of in-state activity. Because the states have at their disposal a broad array of public policies, including tax policies, that they may pursue to promote economic development in ways that do not run afoul of the Commerce Clause, they would not suffer any hardship if the use of the limited set of discriminatory tax incentives at issue in this case were no longer available to them.

This is the public policy and political context in which the constitutional challenge to Ohio's investment tax credit has been brought. This Court cannot, of course, substitute its judgment for those made by state legislatures, no matter how misinformed or self-serving. When state tax legislation violates the Commerce Clause, however, the Court should not hesitate to exercise its authority to enforce the Constitution and invalidate such legislation.

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jobs—$75,000 per job—a figure that raised concerns in the legislature regarding the effectiveness of the program. Rather than substantively addressing these concerns, however, Chairman Gargano, in testimony before a legislative committee, simply revised the calculation of tax benefit per job by dividing the $300 million revenue impact for a single tax year by the total number of employees within Empire Zones of businesses receiving tax benefits, and asserting based on this recalculation that the actual cost per job of the program was $1,170. (Marc Santora, *Zones for Business Tax Breaks Are Debated Along Party Lines*, N.Y. Times, at B5 (April 27, 2004). The State has since authorized twelve additional Empire Zones. (New York Chapter Laws, L. 2005, cc. 61, 63.)

[50] See e.g. Lynch, *supra*, note 41.

## CONCLUSION

For the stated reasons above, it is respectfully urged that this Court affirm the Sixth Circuit's decision that Ohio's investment tax credit violates the Commerce Clause.

Respectfully submitted,

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Nos. 04-1704 & 04-1724

IN THE
SUPREME COURT OF THE UNITED STATES

DAIMLERCHRYSLER CORPORATION, *PETITIONER*
v.
CHARLOTTE CUNO, ET AL., *RESPONDENTS*

WILLIAM W. WILKINS, TAX COMMISSIONER
FOR THE STATE OF OHIO, *PETITIONER*
v.
CHARLOTTE CUNO, ET AL., *RESPONDENTS*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

# BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether respondents have standing to bring this action to enjoin enforcement of the provision of Ohio law that allows an investment tax credit against the State's corporate franchise tax.

2. Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art I, § 8, cl.3.

## CORPORATE DISCLOSURE STATEMENT

Ford Motor Company ("Ford") is a publicly-held corporation. Ford has no parent corporation, and there is no publicly-held corporation that owns 10% or more of Ford's stock.

General Motors Corporation ("GM") is a publicly-held corporation. GM has no parent corporation, and there is no publicly-held corporation that owns 10% or more of GM's stock.

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*TO THE UNITED STATES COURT OF APPEALS*
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# BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONERS

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This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of Ford Motor Company and General Motors Corporation as *amici curiae* in support of petitioners.[1]

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[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

## INTEREST OF *AMICI CURIAE*

1. *The Merits Of This Case Address A Matter Of Substantial Economic Importance To Amici.*

The *amici curiae* are corporations engaged in capital intensive business activities. These activities include, in particular, the manufacture and sale of automobiles and trucks in the United States and in worldwide markets. In the course of these commercial activities, the *amici* make significant capital investments in States such as Michigan and Ohio and also make large investments in foreign locations. In planning these capital investments, the *amici* necessarily consider commercial factors such as the availability of skilled labor and the relative costs of constructing and operating facilities in different locations. The local tax structures and local tax rates that apply to manufacturing operations are among the many significant cost factors that are considered in selecting the location for such facilities.

The *amici* operate manufacturing facilities in several States that possess investment tax credit provisions that are similar or identical to those addressed in this case. For example, *amicus* Ford Motor Company currently employs more than 14,000 people in the State of Ohio and more than 66,000 people in the State of Michigan, and has made more than $11 billion of capital expenditures in these States over the last five years. In addition, during the last five years, Ford has made over $4 billion of capital expenditures in other States that have similar or identical tax credit provisions.

*Amicus* General Motors Corporation currently employs more than 20,000 people in Ohio and more than 75,000 people in Michigan, and has made over $12 billion of capital expenditures in these States in the last five years.

Throughout the Nation as a whole, in other States that have tax credit provisions similar to those at issue in this case, General Motors has invested more than $3 billion in the construction or expansion of manufacturing facilities within the last five years.

In the current conditions of the world economy, the ability of state and local governments to provide tax credits to facilitate the location and expansion of manufacturing activity within their borders is a matter of great importance.[2] The availability of such tax credits allows the States to provide a more level playing field for American manufacturing in worldwide markets. And, the availability of these credits also thereby assists employers such as the *amici* in their efforts to provide employment opportunities, and the economic benefits of employment, in those locations.

2. *The Standing Question Is A Matter Of Recurring Importance To Amici, And Was Raised By Them In The Court Below.*

In the district court, respondents took the position that this action should be remanded to state court because, as they frankly acknowledged, "there are substantial doubts about their ability to satisfy either the constitutional or the prudential limitations on standing" and, in particular, because there is a "serious argument that [they] fail to meet the * * * rigorous Article III tests for citizen/taxpayer standing." Resp. Supp. Motion for Remand (filed June 12, 2000), at 13, 14.

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[2] Respondents acknowledged in their Complaint that the "purpose" and the actual "effect" of state investment tax credits is to influence the investment location decisions of capital intensive businesses. Complaint ¶ 22.

The district court denied the motion to remand on the grounds that the respondents include "taxpayers [who] have standing to object to the property tax exemption and franchise tax credit statutes under the 'municipal taxpayer standing' rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447 (1923)." Order of November 20, 2000, at 6-7. The court of appeals did not address whether respondents satisfied the constitutional standing requirements in this case. In granting the petition for a writ of certiorari, however, this Court directed the parties to address that standing issue.

The *amici* are often parties to tax agreements and to tax determinations made by official government representatives, and the *amici* routinely make substantial investments in reliance upon such official tax determinations. Whether third parties (such as respondents) have standing to attempt to unsettle tax determinations made by a State that concern the taxes owed by other parties (such as DaimlerChrysler) is thus a question of recurring importance to the *amici*. The *amici* therefore argued at the rehearing stage in the court below that, under this Court's settled decisions, respondents lack standing to challenge the application of the Ohio investment tax credit in this case. For these reasons, and also because this standing requirement is jurisdictional, the *amici* will also address this issue in this brief.

## SUMMARY OF ARGUMENT

I. None of respondents has standing to bring this action to enjoin enforcement of the Ohio investment tax credit. The first group of respondents (the "Ohio Plaintiffs") base their claim of standing solely on their status as residents and taxpayers in Ohio. The only injury they claim is that the investment tax credit "depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments." Complaint ¶ 40. This Court rejected that exact claim of "state

taxpayer" standing in *Doremus v. Board of Education*, 342 U.S. 429, 433-434 (1952), holding that this asserted harm is "too indeterminable, remote, uncertain and indirect" to suffice. The claim of injury by a state taxpayer does not satisfy the constitutional minimum for standing because it asserts nothing more than a remote and hypothetical harm suffered "in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

The second group of respondents (the "Michigan Plaintiffs") assert that they have standing due to their status as residents and taxpayers of Michigan. They claim that, if DaimlerChrysler had not been induced by the Ohio investment tax credit to refurbish its facility in Ohio, the company might instead have chosen to relocate that facility to Michigan which, in turn, might have benefited the Michigan plaintiffs by adding additional tax revenues and job opportunities in Michigan. These generalized and indefinite claims of injury by the Michigan Plaintiffs are even more "remote" and "speculative" than those of the Ohio Plaintiffs, and they fail to establish standing for the same reasons.

Moreover, even if the generalized allegations of the Michigan Plaintiffs were otherwise sufficient, they would fail under the separate requirement of the standing doctrine that the plaintiff must establish that a favorable court decision would "redress" the claimed injury. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury alleged by the Michigan Plaintiffs (and by the separate Ohio respondent named Kim's Auto & Truck Service, Inc.) is directly and exclusively the consequence of the location of the DaimlerChrysler facility in Ohio. That injury could be "redressed" only by a court order that would enjoin or prevent the location of the DaimlerChrysler plant in Ohio. Respondents have acknowledged, however, that the

DaimlerChrysler facility in Ohio was in fact completed in 2000 – even before the complaint in this case was filed – and that petitioner has been continuously producing vehicles at that location since that time. See *Kim's Auto & Truck Service, Inc. v. City of Toledo*, Pet. No. 03-1629, at 4-5, cert. denied, 125 S.Ct. 2988 (2005). Recognizing that the plant has already been completed, respondents did not seek to enjoin the location of the DaimlerChrysler facility in Ohio.

There is no basis for any claim – and no claim has been made – that granting the requested injunction against the Ohio tax credit would cause the completed DaimlerChrysler facility in Ohio to be bulldozed and rebuilt at some different location in some other State. There is thus plainly no "substantial likelihood" that the relief requested would redress the injury claimed by the Michigan Plaintiffs or by Kim's Auto. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 75 n.20 (1978). Because their claims of injury would not be "redressed" by the relief they seek, they lack standing to challenge the state tax credit in this case. *Ibid.*

II. If the Court reaches the merits, it should conclude that the Ohio investment tax credit does not violate the requirements of the dormant Commerce Clause. This Court has held that any State may "compete with other States for a share of interstate commerce" so long as it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-337 (1977). The investment tax credit offered by Ohio serves as an inducement to all taxpayers to make new business investment in Ohio, and it does so without imposing any additional tax burden on those taxpayers that choose to invest elsewhere. The Ohio provision is constitutionally permissible because it provides incentives for local economic

development without discriminating against the products of, or business operations conducted in, other States.

The court of appeals misapplied the relevant precedents of this Court. The decisions of this Court on which the court below sought to rely each concern "location incentives" under which the challenged state tax scheme attempted to benefit particular local business activity by imposing additional tax burdens if the activity was conducted out-of-state. By contrast, under the Ohio investment tax credit provision, while local activity is benefited, no additional tax burden is imposed if the targeted activity is undertaken elsewhere. There is no aspect of the Ohio investment tax credit that discriminates against interstate commerce, and the state tax provision therefore does not violate the dormant Commerce Clause.

## ARGUMENT

### I. RESPONDENTS LACK STANDING.

1. *Background of the Standing Issue.*

Article III of the Constitution limits the judicial power to the resolution of "cases" and "controversies." "The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' * * * and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision' * * * ." *Id.* at 472

(citations omitted). The constitutional content of the "standing" doctrine limits the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97 (1968). Vigilant enforcement of the standing requirement "forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Valley Forge*, 454 U.S. at 473.

The Court has summarized the three constitutional elements of the standing requirement as follows. The plaintiff must show that:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000). See also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The Court has had several occasions to apply these standing requirements to actions brought by taxpayers to challenge the constitutionality of state and federal tax legislation. In the early case of *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court held that "a taxpayer of the United States" lacks standing to challenge the constitutionality of a federal appropriation because his interest as a taxpayer "in the moneys of the treasury" was "shared with millions of others," was "comparatively minute and indeterminable," and the

effect of the requested injunction "upon future taxation [would be] remote fluctuating and uncertain." *Id.* at 487. The Court concluded in *Frothingham* that a federal taxpayer lacks standing to bring a challenge to a federal revenue provision when his allegation of injury is "merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.[3]

That same standing rule was held to apply to suits brought by state taxpayers who challenge the constitutionality of state tax and spending provisions in *Doremus v. Board of Education*, 342 U.S. 429 (1952). The Court held that state taxpayers, like federal taxpayers, have an interest that is "too indeterminable, remote, uncertain and indirect" to provide standing to challenge the constitutionality of state revenue measures. *Id.* at 433-434. To bring such a case, the plaintiff must show that he has suffered a "direct dollars-and-cents injury" in "a good-faith pocketbook action." *Id.* at 434. There must be a "special injury" apart from the general allegation that the plaintiff is a "taxpayer" to satisfy that standard. *Ibid.*

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[3] In reaching the conclusion that the interest of federal taxpayers in the federal fisc is insufficient to establish standing to challenge federal revenue measures, the Court pointed out that a different rule had been applied for "resident taxpayers" who brought an action against a "municipal corporation," on the theory that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Frothingham v. Mellon*, 262 U.S. at 486. The Court explained that the different rule for municipal taxpayers was "based upon the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Id.* at 487. See also *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

The decisions rejecting "taxpayer standing" were revisited by the Court in *Flast v. Cohen*, 392 U.S. at 91-94, and in the *Valley Forge* case, 454 U.S. at 477-478. In *Flast*, the Court concluded that a taxpayer, acting *as* a taxpayer and not claiming any direct injury to any other interest, would "be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution" and, in doing so, must claim that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress." 392 U.S. at 102-103.

The *Flast* test was criticized by commentators and has been "sharply limited" by subsequent decisions of the Court. Fallon, Meltzer, Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 128-129, 161 (5th ed. 2003). In particular, in the *Valley Forge* case, the Court endorsed the validity of the general rule that denies standing for federal and state taxpayers, acting *as* taxpayers, in challenging federal and state revenue measures. 454 U.S. at 477-478. The Court stated that the "*Flast* exception to the *Frothingham* principle" was to be applied narrowly and with "rigor." *Id.* at 481 (citing *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974)).

Under *Valley Forge*, an allegation of taxpayer injury that is not based on a specific constitutional limitation on the taxing power and that is instead predicated on the desire, "possessed by every citizen, to require that the Government be administered according to law," is not sufficient to establish standing. 454 U.S. at 482-483. The Court emphasized that general allegations of "taxpayer standing" are insufficient, for "[s]uch claims amount to little more than attempts 'to employ

a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Id.* at 483 (quoting *Flast v. Cohen*, 392 U.S. at 106).

1. *The Nature of Respondents' Claims of Standing.*

In an effort to establish their standing to challenge the Ohio investment tax credit in this case, respondents have segregated themselves into three separate categories:

> (i) the "Ohio Plaintiffs" who base their standing on the claim that they are residents and taxpayers in Ohio who "are injured by this [state tax credit] scheme in that the subsidy depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments" (Complaint ¶ 40);
>
> (ii) the "Michigan Plaintiffs" who base their standing on the claim that they are residents of Michigan who could have benefited from the "economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited," if "the facilities had instead been located in Michigan" (Complaint ¶ 24); and
>
> (iii) a single plaintiff named "Kim's Auto and Truck Service, Inc.," which alleged that its business location was being condemned by the city of Toledo because it was within the area being redeveloped by DaimlerChrysler and that "[w]ithout the aforesaid tax exemption, the [DaimlerChrysler] plant would not have been expanded" (Complaint ¶ 23).

For the reasons that follow, none of these parties satisfies the constitutional requirement for standing to challenge the state

investment tax credit in this case. The courts below therefore lacked jurisdiction over that issue in this case.[4]

3. *The Constitutional Requirements For Standing Are Not Met In This Case.*

a. *The "Ohio Plaintiffs" Lack Standing.* The first group of respondents base their individual claims of standing solely on their status as residents and taxpayers in Ohio. That claim of standing is barred by *Doremus*, in which this Court held that the limitations on federal taxpayer standing established in the *Frothingham* case apply "equally * * * when a state Act is assailed." 342 U.S. at 433-434. *Accord*, *Valley Forge*, 454 U.S. at 478. Unless the taxpayer has himself paid the tax and is bringing an action for a refund, or unless some independent injury has been caused by the statute that makes the plaintiff's action a "good-faith pocket book action," there is no standing for a taxpayer, acting solely in his capacity *as* a taxpayer, to challenge the constitutionality of the state tax. *Doremus v. Board of Education*, 342 U.S. at 431, 434-435 (no standing when the plaintiff premises his claim of standing on the fact he "is 'a citizen and taxpayer' [and] the only interest he asserts is just that").

In the present case, the only injury claimed by the Ohio Plaintiffs is that the investment tax credit "depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments." Complaint ¶ 40. That claimed injury plainly does not suffice. Addressing that exact claim in

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[4] These petitions do not present the question whether any of the respondents has standing to challenge the municipal property tax exemption, which is the subject of respondents' pending petition for a writ of certiorari in *Cuno v. DaimlerChrysler Corp.*, No. 04-1407. See note 3, *supra*.

*Doremus*, the Court stated that it is "too indeterminable, remote, uncertain and indirect" to suffice for standing. 342 U.S. at 433-434. That generalized grievance is not a "special injury" to a "direct and particular financial interest" of the plaintiffs. *Id.* at 434-435. Instead, it is merely an allegation of a remote and unspecific harm suffered "in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. at 488. See *Doremus v. Board of Education*, 342 U.S. at 434. It therefore does not suffice to establish standing in this case. *Ibid. Accord, Coyne v. The American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (a claim of "taxpayer" standing does not allege "an injury that is distinct from the injury shared by all Ohio taxpayers" and is "therefore insufficient to establish an injury in fact")); 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3531.10, at 656-657 (2d ed. 1984) (("[a]ny general argument that the plaintiff is injured because his own tax liability is increased by favorable treatment extended to another taxpayer seems doomed to fail").

The opinion of Justice Kennedy in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), summarizes these established principles and notes that "[t]he question whether taxpayers or citizens have a sufficient personal stake to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens covers old and familiar ground." *Id.* at 613.[5] The general

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[5] While the brief concurring opinion of Justice Brennan in *ASARCO*, 490 U.S. at 633, expressed direct disagreement with the conclusion that a teachers' association lacked standing in that case, it did not state specific disagreement with the separate conclusion that the state taxpayers lacked standing. The concurring opinion stated that it was unnecessary to reach the standing issue in *ASARCO* in any event because federal standing principles did not govern the underlying state court action in that case. See *ibid.*

rule for federal taxpayers is that such suits are not cognizable "because a taxpayer's 'interest in the moneys of the Treasury * * * is shared with millions of others, is comparatively minute and indeterminable.'" *Ibid.* (quoting *Frothingham v. Mellon*, 262 U.S. at 487). And, the Court has "likened state taxpayers to federal taxpayers, and thus [has] refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." 490 U.S. at 613-614 (quoting *Doremus v. Board of Education*, 342 U.S. at 434).[6] Under these established principles, state taxpayers cannot rely on their status as taxpayers alone but must allege "special circumstances or exceptions that would confer standing upon them." 490 U.S. at 614. State taxpayers lack standing, when, as here, they merely allege that the state law they oppose could result "in unnecessarily higher taxes" for them and do not advance any claim upon which they could recover "any direct pecuniary relief from the lawsuit." *Ibid.*

b. *The "Michigan Plaintiffs" Lack Standing.* The "Michigan Plaintiffs" are residents and taxpayers of Michigan who claim that they are injured by the Ohio investment tax credit on the theory that DaimlerChrysler was induced by the credit "to continue to operate its plants in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan." Complaint ¶¶ 3, 42. They broadly assert that, if the plant had been located in Michigan instead of expanded in Ohio, there would have been

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[6] In pointing out that the same standing rule applies to federal and state taxpayers, Justice Kennedy noted in *ASARCO* that "[w]e have indicated that the same conclusion may not hold for municipal taxpayers, if it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" 490 U.S. at 613 (quoting *Frothingham v. Mellon*, 262 U.S. at 486-487). See notes 3 & 4, *supra*.

"economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited." *Id.* ¶ 42.

To the extent that the Michigan Plaintiffs assert standing based on the alleged indirect consequences of the Ohio tax credit on their Michigan tax burden, their allegations are obviously even more attenuated than those of the Ohio Plaintiffs and fail to satisfy the constitutional prerequisites for standing. It is well established that such generalized "taxpayer" allegations are insufficient to establish standing, for there is no "special circumstance" that would create anything other than a "fluctuating and uncertain" possibility that taxpayers will receive any direct pecuniary relief from the lawsuit. *Frothingham v. Mellon*, 262 U.S. at 487; *ASARCO Inc. v. Kadish*, 490 U.S. at 615. The alleged injury is too "remote" and "speculative" to establish standing. It is a prototypical "generalized grievance," which is shared by all citizens alike, and which this Court has "consistently held [is] not cognizable in the federal courts." *Ibid.* (citing, *e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 111-112 (1983); *Valley Forge*, 454 U.S. at 482-487).

The broad allegation of the Michigan Plaintiffs that, if the credits had not been allowed by Ohio, the plant might have instead been relocated to Michigan, is also insufficient to establish the "direct and personal" injury that is required to support standing. The broad suggestion that additional jobs might be created in Michigan if the DaimlerChrysler plant were relocated there is a generalized, rather than a personal, claim and is too "remote or speculative" to establish standing in this case. In particular, there is no allegation that any of the Michigan Plaintiffs "personally has suffered some actual or threatened injury" from the renovation of the Jeep plant in Toledo or from any feature of the challenged Ohio tax credit

provision. *Coyne v. The American Tobacco Co.*, 183 F.3d at 494 (quoting *Valley Forge*, 454 U.S. at 472). The desire of the Michigan Plaintiffs for job growth in the local economy is simply one of "the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts." *ASARCO Inc. v. Kadish*, 490 U.S. at 616 (citing, *e.g.*, *Valley Forge*, 454 U.S. at 482-487).

Moreover, even if such generalized allegations were otherwise sufficient, they would fail under a wholly separate and different branch of the standing doctrine. This Court's cases have made clear that a plaintiff's injury must not only (i) be direct and (ii) be caused by the challenged state statute, but (iii) the plaintiff must also show that a favorable court decision would "redress" the claimed injury. *E.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). As this Court summarized this rule in the *Valley Forge* case, for standing to exist, the "distinct and palpable injury" claimed by the defendant must be "likely to be redressed if the requested relief is granted." 454 U.S. at 475 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). See *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Unless it is "likely, as opposed to merely speculative, that the injury [asserted by the plaintiff] will be redressed by a favorable decision," there is no standing to adjudicate the plaintiff's claims. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. at 181.

The injury alleged by the Michigan Plaintiffs would be "redressed" only by an order that caused relocation of the DaimlerChrysler plant in Toledo to Michigan. Nothing in the Complaint, however, seeks or could possibly result in that relief. In particular, there is no allegation in the Complaint that an injunction entered against the Ohio tax credit

provisions would stop or reverse the improvements at the Jeep plant in Toledo and cause the relocation of the plant to Michigan. Nor could such an allegation have been made in good faith. The improvements at the Toledo facility had long been in progress and, even on the date of the filing of the Complaint, were substantially implemented. By the time that the Complaint was filed (March 29, 2000), the Jeep plant expansion Development Agreement had been in place for almost a year and a half. Complaint ¶ 18. See also page 18, *infra*. In view of the substantial progress of the Jeep expansion project, it was not possible for plaintiffs to contend, in good faith, that an injunction entered against the tax credits would cause the removal of that facility from Toledo. Presumably for this very reason, the Complaint contains no such allegation.

Instead, the Complaint alleges only in the past tense that, in the absence of the challenged Ohio tax benefits, "the Stickney Avenue Jeep plant *would not have been expanded*." Complaint ¶ 23 (emphasis added). Because the complaint acknowledges that the plant already had "been expanded," it is evident that the injury claimed by the "Michigan Plaintiffs" is not "likely to be redressed if the requested relief is granted." *Valley Forge*, 454 U.S. at 475. The disallowance of the agreed-upon tax benefits plainly would not result in the demolition of the improvements at the Jeep plant and in its relocation to Michigan.

It is a settled rule that a plaintiff lacks standing – and the court therefore lacks jurisdiction – when, as here, the "complaint suggests no likelihood that victory in this suit would result" in redress of the asserted injury. *Coyne v. The American Tobacco Co.*, 183 F.3d at 496. Accord, *Valley Forge*, 454 U.S. at 472. Because there is no "substantial likelihood" that the relief requested by the Michigan Plaintiffs will redress the injury they claim (*Duke Power Co. v.*

*Carolina Environmental Study Group*, 438 U.S. 59, 75 n.20 (1978)), they lack standing to challenge the Ohio tax in this case.

c. *No Other Plaintiff Has Standing.* The only other plaintiff that claims to possess standing to challenge the Ohio tax credit provision is "Kim's Auto and Truck Service, Inc.," whose property in Toledo was "slated to be condemned" as part of the Jeep plant project. Complaint ¶ 23. The Complaint asserts, again in the past tense, that, "[w]ithout the aforesaid tax exemption, the Stickney Avenue Jeep plant *would not have been expanded*, causing Kim's Auto to be slated for displacement." *Ibid.* (emphasis added). The remedy sought in the complaint is not an injunction against the completion of the Jeep plant, and no basis for any such injunction is offered. Instead, the complaint seeks only to enjoin Ohio from providing, and DaimlerChrysler from receiving, the Ohio tax credit for the improvements made to that plant.

These allegations are insufficient to support standing. The Complaint lacks any allegation that could support a conclusion that an injunction entered against operation of the Ohio tax credit provision would cause the ongoing improvements at the Toledo Jeep facility to cease or be reversed. And, for the reasons we have just described, no such allegation could have been made in good faith either at the time the Complaint was filed or currently. Indeed, in related pleadings filed in this Court, Kim's Auto has now expressly admitted that "the new Jeep factory [in Toledo] was built and opened in 2001" and has been producing vehicles at that location since that time. *Kim's Auto & Truck Service, Inc. v. City of Toledo*, Pet. No. 03-1629 at 4, cert. denied, 125 S.Ct. 2988 (2005); see also *id.* at 5 ("[t]he new Jeep plant

opened in 2000").[7] There is thus no plausible basis for any contention that an injunction against the Ohio tax credit would remedy the claimed injury of either the Michigan Plaintiffs or of Kim's Auto by causing the relocation of a facility that was evidently completed even before the complaint in this case was filed.

Respondents thus plainly fail to allege an injury that would be redressed by the relief sought. Because there is no "substantial likelihood" that the relief requested by Kim's Auto would redress the injury they claim (*Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. at 75 n.20)), respondents lack standing to challenge the Ohio investment tax credit.[8]

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[7] A decree of condemnation of the Kim's Auto property was entered by the state court in May 2002. The award of compensation for that condemnation became final when the petition for a writ of certiorari from the compensation award was denied by this Court in June 2005. Pet. 03-1629 at 3.

[8] In district court, respondents claimed that they have standing to proceed with their claims in state court, and they requested a remand for that purpose. There is good reason to question whether Ohio decisions would provide a basis for "taxpayer standing" in the context of this case. See *In ex rel Snyder v. State Controlling Board*, 11 Ohio App. 3d 270, 273, 464 N.E. 2d 617, 621 (1983) ("the plaintiff, as a general taxpayer, must show the action complained of has affected the plaintiff's pecuniary interests differently than the interests of the general taxpaying public"). If, however, the case were to proceed on remand in the Ohio courts, and if a final decision adverse to DaimlerChrysler were issued in those courts on the merits, that decision would then be reviewable in this Court on a petition for a writ of certiorari. See *ASARCO Inc. v. Kadish*, 490 U.S. at 619.

## II. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

1. *Introduction.*

If the Court reaches the merits of this case, it will be considering the constitutionality of a classic State business tax incentive – a pure dollar-for-dollar reduction in tax liability for qualified new investment. The Ohio investment tax credit was offered to any entity choosing to increase its investment in machinery and equipment within the State. The tax credit was available not only to Ohio taxpayers such as petitioner, but also to any out-of-state taxpayer wishing to make a new investment in Ohio. In petitioner's case, the new investment was made through an expansion of its existing Jeep facility in Toledo.

The question here presented is whether it is constitutionally permissible for a State to compete for business by offering a straight-forward reduction in tax liability to any taxpayer making the requisite new investment. *Amici* believe the answer is clearly yes, because such an incentive does not discriminate against interstate commerce and does not suffer any other possible constitutional flaws.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), this Court set forth certain fundamental principles that establish the framework within which a State may shape its policy toward business taxation.

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such

> competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. at 336-337. In other words, a State is free to use its tax system not only to encourage the growth of local business, but also to compete for its share of interstate business. The only relevant limitation is that, in so competing, the State may not structure its tax system in a way that imposes a discriminatory tax burden on out-of-state business activity.

Consistent with the foregoing ground rules, a State is clearly free to adopt a low-tax regime as a means of attracting new business. This Court so stated in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994): "In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes."

1. *The Ohio Investment Tax Credit Satisfies This Court's Requirements for Constitutionality.*

The investment tax credit offered by Ohio serves as an inducement to all taxpayers to make new business investment in Ohio. It is effectively a subset of a general low-tax regime because it reduces the amount of franchise tax to be paid by any taxpayer that makes a qualified new investment in the State.

In *amici's* view, the Ohio tax credit is designed in the precise manner contemplated by this Court. It offers a reduction in the State franchise tax without imposing any additional tax burden on those taxpayers that choose to make their new investment elsewhere. The Ohio scheme is

constitutionally permissible because, in the words of this Court, it imposes no tax on "the products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 337.

In analyzing the validity of the Ohio tax credit, the court of appeals below acknowledged the fundamental principles established in *Boston Stock Exchange* regarding a State's ability to compete for interstate business. Pet. App. 4a-5a. It also acknowledged that the Ohio investment tax credit was equally available to in-state and out-of-state businesses. Pet. App. 6a. Nevertheless, it concluded that the tax credit was unconstitutional.

The court of appeals reached its conclusion by fully embracing respondents' argument that the Ohio tax credit had the effect of "coercing" in-state taxpayers to make their new investments in Ohio at the expense of development in other States. Pet. App. 6a. Under the argument espoused by respondents, the decision of an Ohio taxpayer to make a new investment elsewhere would increase the taxpayer's overall tax cost in Ohio. This economic pressure, the argument runs, would influence the taxpayer to invest in Ohio, thereby "hinder[ing] free trade among the states." Pet. App. 9a.[9] In adopting respondents' argument, the court of appeals basically accepted the notion that, by providing a tax benefit to those who made new in-state investments, the Ohio taxing scheme inevitably imposed an impermissible burden on those making out-of-state investments. Pet. App. 9a-10a.

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[9] Respondents do not assert, nor could they, that the Ohio taxing scheme somehow "coerces" *out-of-state* taxpayers to invest in Ohio rather than elsewhere. Ohio's scheme does not have cognizable impact on an out-of-state taxpayer until it chooses to enter the State.

The court's benefit-burden dichotomy reflects a misreading of this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *Bacchus* was a case involving pure "economic protectionism." The State of Hawaii had argued that an exemption accorded certain locally produced beverages from its excise tax on liquor sold at wholesale was permissible because it was intended to benefit a fledging industry and not to discriminate against out-of-state producers. This Court rejected the argument, stating (*id.* at 273):

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

Contrary to the notion advanced by the court of appeals in the instant case, however, this Court did not say in *Bacchus* that *every* taxing scheme benefiting in-state business activity inevitably imposes an impermissible tax burden on out-of-state activity. Only a "discriminatory statute" produces that result. The reference of the court below to the *Bacchus* discussion of benefits and burdens merely begs the question here presented, which is whether the Ohio tax credit provision *is* a "discriminatory statute" in the first instance.

As noted, what the court below considered to be the discriminatory burden imposed by Ohio was the "coercion" of in-state taxpayers to make their new investments within the State in order not to lose the benefit of the Ohio tax credit. In other words, the availability of the credit effectively pressured in-state taxpayers to invest their next dollars in Ohio because, in an economic sense, they could not afford *not* to take advantage of the tax benefit provided.

This reasoning finds no support in the case law and is completely misguided. The only direct consequence of an Ohio taxpayer choosing to invest out-of-state is simply that it would forego the Ohio credit. There would be no additional tax burden or tax cost imposed by the taxing State, which (as we discuss further below) is the touchstone for determining unconstitutionality in a case such as this. Moreover, if the taxpayer elects to invest in another State, it would then be able to benefit from any investment tax credit or other tax benefit available in that other jurisdiction. There is plainly no economic "coercion" in such an arrangement. No case decided by this Court has ever suggested that a tax incentive of the type offered by Ohio is discriminatory merely because those taxpayers who choose to invest elsewhere must necessarily forego its benefit.

2. *The Court of Appeals Misapplied the Relevant Precedents of This Court.*

The court of appeals relied primarily on three decisions of this Court to support its conclusion that the Ohio investment tax credit was unconstitutional. All three cases involved situations where a taxpayer had the choice between carrying on certain targeted activity entirely within the taxing State, or partly within and partly without the taxing State. In each case, some form of tax incentive was offered to encourage the taxpayer to act entirely within the State. In each case, this Court struck down the taxing scheme because the State had impermissibly discriminated against interstate commerce by imposing a higher tax on the taxpayer's activity conducted in-state if it chose to conduct a portion of the targeted activity out-of-state.

Thus, in *Boston Stock Exchange*, *supra*, persons selling stock that would be transferred through a New York transfer agent paid a higher New York transfer tax if they sold their

shares on an out-of-state exchange than if the sale took place on a New York-based exchange. The higher tax imposed by New York when such sales were made out-of-state constituted "both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." 429 U.S. at 331.

In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), a subsidiary of Westinghouse that was engaged in the export business shipped its products from New York and elsewhere. Its income was consolidated with that of its parent, apportioned to the State, and subjected to the State's franchise tax.[10] A tax credit was allowed for exports attributable to New York. Calculation of the credit was based in part on the ratio of the subsidiary's New York exports to its total exports. If the subsidiary increased its out-of-state exports relative to its New York exports, its credit would be proportionately reduced and its New York franchise tax would be correspondingly increased, even though its export income subject to tax in New York remained the same. This Court concluded that the New York credit impermissibly discriminated against interstate commerce by penalizing the taxpayer for export activity outside the State.

The final case relied on below was *Maryland v. Louisiana*, 451 U.S. 725 (1981). That case involved Louisiana's imposition of a "first use" tax on natural gas that had not been subjected to tax by another jurisdiction. The tax was aimed primarily at gas that was brought onshore from the Outer

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[10] New York utilized the standard three-factor State apportionment formula, under which the ratio of a taxpayer's property, payroll and sales within the State to its total property, payroll and sales determined the percentage of its taxable income properly apportionable to, and taxable by, New York. N.Y. Tax Law 210.3 (McKinney Supp. 1983-1984).

Continental Shelf (OCS) and piped to processing plants in Louisiana. Although the tax was imposed on the owner of the gas, it was required to be passed on to the ultimate consumer. Because of numerous exemptions and credits allowed for local use and consumption, the tax was actually borne only by out-of-state consumers who purchased gas from within the State. The Louisiana scheme was struck down because it favored local consumption and discriminated against interstate commerce.

As noted, all three of the foregoing cases involved situations where the taxing State overreached by increasing the tax on in-state activity if the taxpayer undertook to conduct some portion of its activity out-of-state. In each case, this Court determined that the taxing scheme imposed an impermissible burden on interstate commerce. Here, by contrast, the Ohio taxpayer that decides to spread its business investment into another State does not suffer a higher tax on its Ohio activities as a result. It is simply unable to claim an Ohio tax credit for its out-of-state investment.

Both respondents and the court below highlighted one aspect of the taxing scheme considered in *Maryland v. Louisiana*, namely, the allowance of a severance tax credit arguably designed to encourage in-state gas production. In addition to the first use tax imposed on OCS gas brought onshore, Louisiana imposed an equivalent severance tax on gas extracted from within the State. A credit against the severance tax was allowed for any first use tax paid. Thus, only those taxpayers producing in both locations could obtain the benefit of the credit. This Court found the severance tax credit to be an objectionable aspect of the Louisiana taxing scheme (451 U.S. at 756-757):

> On its face, this credit favors those who both own OCS gas and engage in Louisiana production. The

> obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States.

The court below viewed this Court's discussion of the severance tax credit as support for respondents' contention here that the "economic effect" of the Ohio investment tax credit was "to encourage further investment in-state at the expense of development in other States." Pet. App. 9a.

The court below misunderstood this Court's analysis. Economic pressure was imposed by the severance tax credit because any new gas brought into the State from new investment *offshore* was necessarily subject to the first use tax. If produced in-state rather than offshore, however, this new gas would bear no tax because of the way the credit worked. This Court saw the credit as unacceptably coercive as to offshore producers because it eliminated an otherwise certain tax.

In this case, respondents and the court below have suggested that the Ohio scheme puts a similar economic pressure on in-state taxpayers to make their new investments within the State rather than elsewhere. They claim that those investing in-state will enjoy "a reduced tax burden," while in-state competitors investing their next dollars out-of-state will "face a comparatively higher tax burden." Pet. App. 6a. But, neither respondents nor the court below assert here that the "comparatively higher tax burden" for those investing out-of-state is a certainty, or that it could be completely avoided by investing in-state. The reason why they make no such assertions is clear.

All other things being equal, an Ohio taxpayer making its next machinery and equipment investment out-of-state rather than in-state would *not* face an increased Ohio franchise tax bill. Indeed, such a taxpayer almost certainly would find that, even without the benefit of the investment tax credit, it would actually have *reduced* its Ohio tax liability by investing out-of-state. That is because any new out-of-state investment would have increased the denominator, but not the numerator, of the property factor (and perhaps also the payroll and sales factors) used in its Ohio apportionment formula.[11] An increase in the denominator(s), but not the numerator(s), of the taxpayer's apportionment factor(s) would necessarily cause *less* of its total income to be apportioned to Ohio and therefore *less* Ohio tax to be paid.[12]

Conversely, if the taxpayer had *increased* its in-state investment, the result would have been an equal increase in *both* the numerator(s) and the denominator(s) of the taxpayer's Ohio apportionment factor(s), thereby causing *more* of its total income to be apportioned to Ohio. That, in turn, could potentially produce a *higher* Ohio franchise tax liability, even after allowance for the investment tax credit to which the taxpayer would have been entitled in such a case. In this situation, the tax credit can be seen for what it is, namely, a partial offset to what could otherwise be an increase in Ohio franchise tax as a result of the new in-state investment.

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[11] For franchise tax purposes, Ohio uses the standard three-factor apportionment formula described in note 9, *supra*. Ohio Rev. Code § 5733.05(B).

[12] As noted in *Kraft General Foods v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 80-81 (1992), it is appropriate to take the State's entire taxing scheme into account in considering a claim of discrimination.

In short, the situation presented here is the exact opposite of the situation this Court found objectionable in *Maryland v. Louisiana*. There is absolutely no assurance that the decision by an Ohio taxpayer to forego the benefit of the Ohio tax credit by making new investment out-of-state would result in an *increase* in the taxpayer's Ohio tax liability. In fact, the actual result of such an investment decision would ordinarily be to *reduce* its Ohio tax liability, not increase it.

All three of this Court's decisions that were primarily relied on by the court below involved, in one form or another, what the court of appeals referred to as "location incentives." Pet. App. 10a. In each case, the State's taxing scheme sought to influence a location decision by benefiting particular business activity if conducted locally and imposing an additional tax burden on the taxpayer if the same activity were conducted out-of-state. In each case, this Court struck down the taxing scheme in question.

The Ohio tax credit is also a location incentive. But under Ohio's tax regime, while local activity is benefited, there is no additional tax burden imposed if the targeted activity is undertaken elsewhere.

Nothing in the dormant Commerce Clause justifies treating a state tax incentive as unconstitutionally discriminatory when, as here, taking advantage of the incentive actually has the potential for increasing state taxes (by increasing the amount of income to be apportioned to Ohio) and the only consequence of locating the investment elsewhere is foregoing the opportunity to claim the Ohio tax credit. Yet, that is precisely the holding of the court below.

There is no aspect of the Ohio investment tax credit that discriminates against interstate commerce. There is no limitation on the class of taxpayers entitled to claim the

credit. There is no burden imposed by Ohio on those taxpayers, whether in-state or out-of-state, that choose not to take advantage of the credit. As this Court declared 119 years ago, the dormant Commerce Clause has application in a case such as this only if the taxing scheme in question has imposed "a regulation in restraint of commerce among the states." *Walling v. Michigan*, 116 U.S. 446, 455 (1886). There is no such "restraint of commerce" inherent in the Ohio taxing scheme and therefore no basis for declaring the Ohio investment tax credit unconstitutional.

## CONCLUSION

For the foregoing reasons, the decision of the court of appeals holding the Ohio investment tax credit invalid under the Commerce Clause should be vacated and dismissed for lack of jurisdiction or, in the alternative, should be reversed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

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DAIMLERCHRYSLER CORPORATION,
*Petitioner*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents*.

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND THE DETROIT BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

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IN THE

# Supreme Court of the United States

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## BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND THE DETROIT BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

This brief *amicus curiae*[1] is filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (UAW), an international

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

labor union, headquartered in Detroit, Michigan, consisting of nearly 1,000 local unions representing approximately 1.3 million active and retired members and their families and the Detroit Branch of the National Association For The Advancement of Colored People (NAACP). The parties to the case have consented to the filing of this brief *amicus curiae.*

The UAW represents members employed both within and outside of the automotive industry. Those members are employed in states throughout the nation that utilize tax incentives like the one at issue in this case, including Ohio. In fact, the plant at the center of this controversy, DaimlerChrysler's Jeep Assembly Plant in Toledo, Ohio employs 3,628 active UAW members.

The Detroit Branch of the NAACP is the Detroit chapter of the nation's oldest civil rights organization. It received its charter from the national organization in 1912 and has remained the largest branch of the NAACP since its inception. The Detroit Branch has a lengthy history of participation in groundbreaking civil rights litigation. It also is dedicated to the promotion of investment in minority and inner-city communities. Because tax credits, like the one at issue in this case, are one of the most important tools used to encourage business development and employment in distressed areas, the Detroit Branch has a significant interest in the outcome of this case.

## SUMMARY OF ARGUMENT

In the decision at issue in this case, the Sixth Circuit Court of Appeals found that Ohio's investment tax credit, which is utilized to attract business and jobs to the state, violates the Commerce Clause of the United States Constitution by discriminating against interstate commerce. By prohibiting Ohio's use of its investment tax credit, the Court of Appeals' apparently intended to level the playing field amongst states

competing for new businesses and jobs by making sure that a state does not employ incentives that discriminate against interstate commerce. We submit that the Court of Appeals' decision does not achieve this goal and may indeed work directly against it. As a result, we would also submit that the Court of Appeals' decision in this regard should be reversed.

## ARGUMENT

It is the plain reality of today's economy that states routinely compete with each other to entice corporations to invest in their states. In fact, states have no choice but to offer such incentives because "every other serious contender state and community will give them, and more importantly, the companies have come to expect them." KIM HILL & EMILIO BRAHMST, CENTER FOR AUTOMOTIVE RESEARCH, THE AUTO INDUSTRY MOVING SOUTH: AN EXAMINATION OF TRENDS (2003) at *http://www.cargroup.org/pdfs/North-South Paper.PDF* at 12. This is certainly true in the automotive industry where states employ various tools in their efforts to persuade businesses to invest. The list of incentives offered by states to entice businesses to invest locally includes tax abatements, job creation tax credits, site preparation assistance, subsidized land purchases, employee recruitment and training subsidization, and on and off-site infrastructure improvements. *Id.* at 11.

States do not use the available tools identically in their efforts to convince businesses to invest locally. Indeed, some of those tools are more available in one state than another. A state with good infrastructure and a skilled workforce but higher operating costs, such as wages or taxes, must rely more heavily on tax incentives to persuade businesses to invest there. A state that has less infrastructure and a less skilled workforce, but lower operating costs, may employ investments in infrastructure and training to convince an employer to invest, while not needing to rely to the same

extent on tax incentives to create a package that is attractive to an employer.[2]

Historically, the various states' economies have developed differently and to a certain extent those differences are regionally related. In pointing out this distinction our aim is not to pit one region against another but rather to make clear that the states enter the competition for new jobs from varied positions. As a result, the Court of Appeals' decision, which simply does not take this factor into account, creates a situation in which the playing field has not been leveled but rather has been tilted—even if unintentionally—in favor of some states.

What the Court of Appeals' decision has done is to take a tool away from the state of Ohio—namely its ability to utilize tax credits as incentives to encourage local investment—while leaving intact the various other tools that may be utilized by the states. Because the states find themselves in different positions in terms of what they may offer to encourage a business to invest locally, the inevitable result of the Court of Appeals' decision is to place a state like Ohio, that relies more heavily on tax incentives, at a disadvantage compared with a state that may employ other incentives like infrastructure improvements and investments in training, incentives that are not affected by the Court of Appeals' decision.

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[2] In a comparison of incentive packages offered by northern and southern states, the northern states' incentive packages were made up of 83 percent tax abatements and 13 percent infrastructure improvements. The southern states used packages made up of only 38 percent tax abatements, while 44 percent of the incentives were provided through improvements to infrastructure and 18 percent through employee training, screening and recruitment. In raw numbers, this means that southern states are contributing $52 million more on infrastructure improvements than northern states and $23.2 million more for employee recruitment and training. *Id.* at 11.

The scenario created by the Court of Appeals' decision leaves Ohio and any other similarly situated state in a troubling position. That is, in response, Ohio is faced with at least two equally problematic options. In order to remain competitive with other states, it might decide that it has to lower dramatically or abolish altogether its franchise tax, a result that would be a greater drain on state revenues than the incentives that are challenged in this case by the Respondents. Another option available to the state is to offer a package to DaimlerChrysler or another corporation that does not include the prohibited tax incentives. However, because of the unique economic circumstances of Ohio, that package is likely to fall far short of packages offered by other states because Ohio will not be able to make up for the lack of tax incentives with other permitted incentives. As a result, the business in question is likely to choose another state, the state that has offered it a more appealing package of incentives. What Ohio loses in this transaction, based on its inability to compete fairly, is striking.

The state has not just lost thousands of new jobs created by a facility like the Jeep Assembly Plant. It has lost thousands of highly paid jobs that offer pensions and healthcare. The average wage of an auto assembly worker is $69,500 annually. HILL & BRAHMST at 11. Moreover, because these jobs are highly paid, their impact on the state's economy is even more dramatic. In fact, for every auto assembly job created, 6.5 more jobs are created in the economy. *Id.* These numbers are more than mere statistics, they are tremendously important to a state like Ohio that lost 244,000 jobs (191,000 in manufacturing) in the period between November 1999 and November 2003 (JON HONECK, POLICY MATTERS OHIO, INTERNATIONAL TRADE AND JOB LOSS IN OHIO (2004) at *http://www.policymattersohio.org/trade.htm.*) and that has an unemployment rate of 6.1%. BUREAU OF LABOR STATISTICS, REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT (May 2005) at *http://www.bls.gov/news.release/pdf/laus.pdf*

If the evil intended to be addressed by the Court of Appeals' decision is discrimination against interstate commerce, then it seems particularly troubling that the result of its decision would be to place one state, such as Ohio, at such a disadvantage in its ability to compete for the kinds of good jobs created by new facilities like DaimlerChrysler's Jeep Assembly Plant.

It also bears note that the Respondents' challenge to the incentives at issue appears to be based on the assumption that such incentives cost the states more than they contribute. However, the evidence is to the contrary. The Center for Automotive Research (CAR) in Ann Arbor, Michigan indicates "that an incentive package paid to encourage an automaker to invest in a community is quickly recovered through tax revenues generated by jobs created, along with additional indirect or spinoff employment effects." HILL & BRAHMST at 12. The CAR's research offers the example of a facility built in Flat Rock, Michigan by Ford Motor Company. While the state of Michigan and the City of Flat Rock offered $125 million in tax breaks to Ford, the state estimated that as a result of the investment, it would reap $850 million in taxes from the 1,945 workers employed in the facility as well as from the additional employees hired by the plant during the life of the agreement and by the 6,300 indirect jobs created by the money spent in the state's economy by the company and its employees. *Id.*

But our purpose here is not to debate the merits of tax incentives offered to investing businesses by the various states. Rather, our purpose is to highlight the very real consequence of the Court of Appeals' decision. That consequence is to create a situation in which some states are handicapped in their ability to compete for new business investment and jobs while other states remain relatively unimpacted in their ability to entice local investment. The UAW and the Detroit Branch of the NAACP respectfully submit that this could not have

been the intended consequence of the Court of Appeals' decision, a decision purportedly aimed at eliminating discrimination against interstate commerce.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals with respect to Ohio's investment tax credit should be reversed in relevant part.

Respectfully submitted,

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*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF *AMICUS CURIAE* OF THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

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## INTEREST OF *AMICUS CURIAE*

The Michigan Manufacturers Association ("MMA") is a business association composed of more than 3,000 Michigan businesses. An important aspect of MMA's activities is representing the interests of its member-companies in matters of paramount importance before state and federal courts, the United States Congress, the Michigan legislature, and state agencies.[1] MMA appears before this Court as a representative of business concerns employing over 90% of the industrial workforce in Michigan.

Resolution of the issues presented by this case will have profound and far-reaching implications for MMA's members and for the economy of the State of Michigan. Michigan's employment base has suffered substantial erosion in the past decade, particularly in the manufacturing sector. Many manufacturing jobs formerly performed within the state have disappeared overseas, and are unlikely to return. Michigan and its neighbor states of the Sixth Circuit are in the midst of an intense struggle to maintain the manufacturing base that has provided the life blood of the region's economy for generations.

The decision of the United States Court of Appeals for the Sixth Circuit[2] below threatens to deprive these states of an important tool in that struggle – the use of tax incentives to encourage capital investments that create jobs for their citizens. Unfortunately, that decision was procured by a group of litigants whose financial interest in the outcome of this case is essentially nil. Because that

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[1] No person or entity, other than MMA and its members, made a monetary contribution to the preparation or submission of this brief.

[2] *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004).

lack of financial interest also connotes lack of standing to seek the relief the panel below granted, this case should be remanded to the court below for dismissal.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The presence of this case on this Court's docket represents the culmination of a lengthy crusade on the part of plaintiffs' counsel, Professor Peter Enrich, to remake the tax policy of the states, using the Commerce Clause as his tool. Almost a decade ago, Professor Enrich published a detailed argument[3] that tax incentives offered by the states to attract business were "contrary to their citizens' interests."[4] His mission was nothing less than to, in his words, use the Commerce Clause to "protect the states themselves against competitive exercises of their sovereignty."[5] With the help of consumer activist Ralph Nader, Professor Enrich assembled a group of plaintiffs and brought this case.[6]

While vaulting his theory from the printed page to this courtroom undoubtedly represents a personal and professional triumph for Professor Enrich, the process by which this occurred presents troubling jurisprudential issues. This Court's purpose is not to provide peer review of academic papers, but rather to resolve flesh-and-blood

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[3] Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996).

[4] *Id.* at 380.

[5] *Id.* at 381.

[6] Enrich, *Breaking the Incentive Cycle: A Role for the Courts*, Corporation for Enterprise Development Accountability Newsletter, Volume 1, Number 9, September 1999.

controversies. In the present case, the controversy is arguably real enough, but it does not involve these plaintiffs to any justiciable degree. Because the plaintiffs lack standing to place before this Court the issue that forms the basis of this case, the case should be remanded to the court below for dismissal.

## ARGUMENT

### THE PLAINTIFFS IN THIS CASE HAVE SUFFERED NO COGNIZABLE INJURY THAT IS REDRESSED BY THE DECISION BELOW

#### A. Plaintiffs' Standing Is Based Only on Plaintiffs' Status as Ohio Taxpayers.

As noted, this case is in essence the actualization of a legal theory put forth in a law review article. Historically, this Court has declined to render decisions on the basis of interesting legal theories, but rather has required that the parties that bring a case to this Court have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of questions which the court so largely depends for illumination of difficult constitutional issues," *Flast v. Cohen*, 392 U.S. 83, 99 (1968), citing *Baker v. Carr*, 369 U.S. 186, 204 (1962). This requirement of standing "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). This Court has summarized the elements of the standing requirement as follows:

"A plaintiff must allege personal injury [the injury element] fairly traceable to the defendant's allegedly unlawful conduct [the causation element] and likely to be redressed by the requested relief [the redressibility element]," *Allen v. Wright*, 468 U.S. 737, 751 (1984). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), these requirements were spelled out in more detail:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." 504 U.S. at 560 (citations and footnote omitted).

None of the plaintiffs in this case can demonstrate all three of these elements to a degree quantifiably sufficient to claim standing before this Court.

Every bit of information there is to know about these plaintiffs and their alleged justification for bringing this case can be found in the following eight paragraphs of the Complaint for Declaratory and Injunctive Relief they filed in the Lucas County, Ohio, Common Pleas Court:

> 2. Plaintiffs Charlotte I. Cuno, Mary L. Branwen, Judith A. Pfaff, Kenneth P. Pfaff, Robert Scott Brundage, Herbert H. Raschke,

Carol A. Raschke, Duane M. Arquette, Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek and Rick Van Landingham are all residents of the City of Toledo, Lucas County, Ohio and as such are property owners and/or renters and pay property, sales and/or income taxes to the City of Toledo, Lucas County and the State of Ohio. Plaintiffs Mary Ebright, Helen Czapczynski, and Jean E. Kaczmarek all formerly resided within the development zone of DaimlerChrysler, Inc.'s Jeep plant project which is described further herein, and all three of said Plaintiffs were displaced from the homes they owned and/or resided in as a result of the use, or threatened use, of the eminent domain power by the City of Toledo to obtain title to their land in order to convey it to DaimlerChrysler Corporation for the Jeep plant project.

3. Plaintiffs Kathleen Hawkins and Carrie Hawkins (the "Michigan Plaintiffs") are residents of the State of Michigan, and they pay various taxes to the State of Michigan. Plaintiff Kathleen Hawkins owns residential real property in Michigan and pays property taxes thereon.

4. Plaintiff Phoenix Earth Food Co-op, Inc. is a not-for-profit corporation under the laws of the State of Ohio the purpose of which is to operate a food sales cooperative in the City of Toledo. The Co-op pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

5. Plaintiff Hutton Pharmacy, Inc. is a for-profit corporation under the laws of the State of Ohio which operates a drug store and pharmacy business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

6. Plaintiff Kim's Auto and Truck Service, Inc. is a for-profit corporation under the laws of the State of Ohio which operates an automotive mechanical repair business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio. Said Plaintiff's business is, as of the time of filing of this Complaint, located within the boundaries of the Jeep plant project. This Plaintiff's real estate is currently facing the invocation, or threatened invocation, of the power of eminent domain by the City of Toledo in order for the land on which it is located at 3708 Stickney Avenue, Toledo to be conveyed to Defendant DaimlerChrysler, Inc. as part of the Jeep plant project. The Plaintiffs enumerated in ¶¶ 2, 4, 5 and 6 herein are collectively referred to as the "Ohio Plaintiffs."

* * *

22. The Ohio Plaintiffs are injured by this scheme in that the subsidy has the effect of reducing the funds available for the operation of the Toledo Public Schools, Washington Local Schools and City of Toledo, to which the Ohio Plaintiffs contribute through their tax payments. The tax exemption to DaimlerChrysler thereby diminishes the funds available to these governmental bodies for lawful uses and shifts to the Ohio Plaintiffs a disproportionate burden of supporting these governmental functions.

23. One Ohio Plaintiff, Kim's Auto and Truck Service, Inc., is a small business whose real property on Stickney Avenue in Toledo as of the filing of this Complaint is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep

plant project. Without the aforesaid tax exemption, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent loss of business customers, all as a consequence of displacement.

24. This tax incentive was part of a $281,000,000 taxpayer subsidy package which induced DaimlerChrysler to locate its facilities in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan. If the facilities had instead been located in Michigan, such location would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the state of Michigan, from which the Michigan Plaintiffs would have benefitted. The Michigan Plaintiffs are directly injured by Toledo's subsidies to DaimlerChrysler.

While the Complaint alludes vaguely to a "subsidy" or "tax subsidy package," the issue for decision by this Court is the narrow one of whether a particular provision of the Ohio Revised Code, § 5733.33, violates the Commerce Clause. More specifically, the question is whether a credit against the Ohio franchise tax, the availability of which is conditioned on investment in property to be placed in service in Ohio, discriminates against interstate commerce.

What basis do any of these plaintiffs have to challenge this statute? Citation to authority is hardly necessary to dispense with the "Michigan Plaintiffs." Their claim is that they would have benefited from "economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan" had DaimlerChrysler located its plant in Michigan "which, upon information and belief," was a likely alternative site.[7] A more indirect, speculative, and dubious connection to Ohio's franchise tax can hardly be imagined. This Court has consistently held that standing does not exist where a litigant is unable to demonstrate more than "that he suffers in some indefinite way in common with people generally," *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923). Here, the Michigan Plaintiffs suffer no more from the operation of the Ohio franchise tax credit than the citizens of every other state where the DaimlerChrysler Jeep plant is *not* located.

Standing is likewise absent in the case of the Ohio resident individuals and the one business, Kim's Auto and Truck Service, who allegedly have been or are threatened to be "displaced" by the City of Toledo's exercise of the power of eminent domain in support of the physical expansion of the DaimlerChrysler facility. This Court has recently had occasion to explore the boundaries of permissible public uses for which the taking power may be

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[7] This allegation is doubly ironic, first, because the Complaint studiously avoids mentioning the possibility that the "Ohio Plaintiffs" might likewise enjoy these "economic opportunities" as a result of placement of this facility in Toledo, and second, because the State of Michigan, arguably the real party in interest for purposes of the claims of the "Michigan Plaintiffs," has actively joined in the effort to overturn the decision below.

exercised, and in doing so has interpreted that power broadly.[8] Regardless, the connection between Ohio's taxing power and Toledo's taking power is far too tenuous to bear the weight of this Commerce Clause challenge. As noted in *Lujan*, *supra*, "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court" 504 U.S. at 560 (citations and internal punctuation omitted). The City of Toledo is technically "before the court," but not to answer for its exercise of the power of eminent domain.

### B. Taxpayer Standing Is Not Available in the Absence of Expenditure of Funds.

What is left, then, are the claims of the "Ohio Plaintiffs" in their capacities as taxpayers, but even then the nature of those claims is not altogether clear. It is alleged, for example, that some Ohio Plaintiffs pay property taxes, and that "the tax exemption to DaimlerChrysler . . . has the effect of reducing the funds available for the operation of the Toledo Public Schools, Washington Local Schools and the City of Toledo." This allegation may implicate the property tax exemption aspect of this case, which this Court has chosen not to review, but it has nothing to do with the investment tax credit against the Ohio franchise tax.

Indeed, it is not evident from the pleadings that any plaintiff even pays the franchise tax to which the investment credit applies. But if one or more of them does, there

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[8] *Kelo, et al. v. City of New London*, ___ U.S. ___, 125 S. Ct. 24 (2005).

is (and can be) no claim that those plaintiffs are discriminated against by the investment tax credit. The central claim in this case is that the credit discriminates against out-of-state interests. By definition, this claim automatically excludes any possible claim of damage to any of the Ohio Plaintiffs, and indeed no such claim of damage is made.

Reading the allegations of the Complaint as generously as possible, its thesis is that the investment tax credit actually discriminates against someone other than the Ohio Plaintiffs *but*, by granting the discriminatory credit, the State of Ohio damages the Ohio Plaintiffs by transferring to them some unspecified additional element of the financial support of the state. Even under this reading, however, these plaintiffs satisfy neither the injury nor the causation element of the standing requirement.

In the context of lawsuits brought by taxpayers, the injury and causation elements of the standing requirement have uniformly taken the form of a challenge to a governmental expenditure – what this Court has described as "a good-faith pocket-book action," *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). There is no such expenditure in the present case. The State of Ohio has not spent so much as a nickel derived from any of the Ohio Plaintiffs in granting the tax credit in question. What it has done is to *refrain* from collecting a tax from someone else. But that act of grace to another cannot, consistent with this Court's holding in *Doremus*, and its subsequent holding in *United States v. Richardson*, 418 U.S. 166 (1974), form the basis for a claim by a taxpayer *qua* taxpayer. What this Court said in *Richardson* applies equally here:

> While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute. 418 U.S. at 177.

Absent a challenge to the exercise of the State of Ohio's spending power, the Ohio Plaintiffs as taxpayers lack standing to challenge the constitutionality of this tax statute.

### C. "Tax Expenditure" Theory Does Not Supply Standing.

Respondents might argue in opposition to the foregoing that there is no difference in substance between an actual expenditure of tax funds of the type this Court has required for standing and a "tax expenditure" – the amount of funds theoretically "spent" by government when it declines to exercise its taxing power in a specific circumstance, e.g., by exempting charitable organizations from the income tax. This argument cannot succeed, however, in light of this Court's holding in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

*Camps Newfound* involved a Commerce Clause challenge to a Maine statute that provided a property tax exemption for "benevolent and charitable institutions incorporated" within the state, but which was subject to certain limitations for institutions "in fact conducted or operated principally for the benefit of persons who are not residents of Maine." The Maine Supreme Judicial Court had upheld the constitutionality of the statute, "noting

that a Maine statute characterized tax exemptions as 'tax expenditures.'"

On appeal, this Court declined to equate tax exemptions with tax expenditures for Commerce Clause purposes, saying:

> Although tax exemptions and subsidies serve similar ends, they differ in important and relevant respects, and our cases have recognized these distinctions.
>
> * * *
>
> Assuming, *arguendo*, that the Town is correct that a direct subsidy benefiting only those nonprofits serving principally Maine residents would be permissible, our cases do not sanction a tax exemption serving similar ends. 520 U.S. at 589.

The importance of this holding for purposes of standing (as opposed to for purposes of the Commerce Clause itself) is that these plaintiffs cannot substitute an alleged "tax expenditure" for an actual outlay of money by the state in order to meet the minimum requirements of standing imposed by *Doremus* and *Richardson*.[9]

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[9] Conversely, if this Court chooses to abandon its holding in *Camps Newfound* and equate a tax exemption with a subsidy for standing purposes, the underlying Commerce Clause dispute necessarily disappears because, as this Court noted in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994), "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." Indeed, one commentator has suggested that the difficulty in drawing a principled distinction between tax exemptions and subsidies should prompt this Court to leave the field of dormant Commerce Clause jurisprudence entirely. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant*

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**D. The Ohio Plaintiffs Likewise Fail the Redressibility Test.**

Even if one were to grant credibility to the dubious "tax expenditure" rationale, a ruling that the Ohio investment tax credit discriminates impermissibly against interstate commerce places the plaintiffs in no better position than before. If the credit is struck down, there can be no assurance that tax revenues will increase as a result, or that DaimlerChrysler or any other taxpayer will engage in business activities in Ohio at the same level, or at all. What Justice Kennedy said in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), therefore resonates here:

> [I]t is pure speculation whether [this] lawsuit would result in any tax relief for respondents. If they were to prevail, it is conceivable that more money might be devoted to education; but since education in Arizona is not financed solely from the school trust fund . . . , the State might reduce its supplement from the general funds to provide for other programs. The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain . . . " 490 U.S. at 614.[10]

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*Commerce Clause Prohibition on Discriminatory Taxation*, 29 Ohio N.U.L. Rev. 29 (2002).

[10] In *ASARCO*, this Court held, without citation to authority, that the plaintiffs there had standing, notwithstanding that there was "no basis on which to find that [they] would satisfy the requirements of federal standing articulated by our precedents," because the case had come up through the Arizona state court system and it was "the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit." 490 U.S. 616-17, 618. In other words, the injury in fact in *ASARCO* was to the defendants-petitioners, and arose as a result of the

(Continued on following page)

It is unclear what the Plaintiffs in this case actually want for themselves, beyond vindication of the legal theory of their counsel, but to the extent it involves any financial interest whatever, the possibility of recovery of that interest by this lawsuit is likewise "remote, fluctuating, and uncertain."

## CONCLUSION

It is evident that these plaintiffs entirely lack the personal financial stake in the outcome of this case that this Court has traditionally demanded of litigants appearing before it. The relief sought and obtained from the panel below confers no discernible benefit on them while harming all of the Defendants as well as the citizens of Ohio. What the plaintiffs have done, ultimately, is to instigate a controversy in which they have no constitutionally significant involvement. This is an inherently suspect route into this Court:

> When . . . , as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed [to establish standing.] [W]hen the plaintiff is not himself the object of the government action or inaction he

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state court's ruling on federal law. In the present case, litigation was commenced in the state court, but removed immediately to federal court. In these circumstances, the Court has no need to defer to a state court's "authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on [its] own interpretations of federal law." 490 U.S. at 617. Thus, nothing in *ASARCO* prevents this Court from remanding the present case to the court below for dismissal.

> challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish,"

*Lujan v. Defenders of Wildlife, supra*, at 562.

This Court should not be deterred from ordering dismissal of this case by the fact that these plaintiffs may be the only parties who can or will bring this action. What this Court said in *United States v. Richardson, supra*, is instructive in this regard:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system

> provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them. 418 U.S. at 179 (emphasis in original).

In *Doremus*, this Court observed: "It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury, but is a religious difference." 342 U.S. at 434. Likewise, the present case involves not a dollars-and-cents injury but a tax policy difference. Those, like Respondents and their counsel, who disagree with Ohio's tax policy (which is the tax policy of most other states as well) are free to address those issues at the ballot box. They do not, however, have standing to assert that disagreement here.

Respectfully submitted,

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

DAIMLERCHRYSLER CORPORATION, ET AL.,

Petitioners,

-against-

CHARLOTTE CUNO, ET AL.,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

# BRIEF AMICUS CURIAE OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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## INTEREST OF THE AMICUS CURIAE

The City of New York, like many state and local taxing jurisdictions throughout the United States, offers a variety of tax credits against its business taxes designed to foster private investment. Eligibility for these credits often requires a business to make capital expenditures for new facilities or to improve existing ones, and, in some instances, to maintain a minimum level of employment for a specified period at the facilities paid for with these private expenditures. The amount of the tax credit is, generally, based upon the dollar amount of the business expenditures for the new or improved facilities or equipment. The City of New York grants these credits only with respect to private expenditures made for local facilities, and does not credit investments in facilities located outside of the City of New York, in which it has no sovereign interest. The credits are not in any way based upon a taxpayer's level of local or interstate business activity, are unrelated to the amount of a taxpayer's local manufacturing or sales, and are awarded without regard to whether the taxpayer is a local or an interstate business. Behind these credits is the hope that an increase in local business investment will encourage local business activity with a concomitant improvement in the local economy and employment levels. There is not, however, a necessary link between the two, and the experience of the Federal government and many states with investment tax credits has shown that these credits do not always work to increase local business activity nor jobs. The City of New York, nevertheless, believes that these credits foster a climate conducive to business development and desires to maintain them as a less expensive means to subsidize these private expenditures, which, the City of the New York believes best serves its citizens.

Pursuant to Supreme Court Rule 37.4, the City of New York submits this brief in support of the petitioners in this

case in order to show that investment tax credits and similar credits do not violate the dormant Commerce Clause of the United States Constitution, which prohibits only those regulatory and taxing measures that operate like a tariff.

## SUMMARY OF THE ARGUMENT

This Court has consistently confined the scope of the Commerce Clause in its negative aspect to regulatory and taxing measures which have the effect of a tariff, "that is, no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *See, e.g., Westinghouse Electric Corp. v. Tully et al.*, 466 U.S. 388, 407 n.12 (1984). As will be shown, *infra*, the Court has consistently described tariff-like taxing measures as those which, either, discriminatorily tax the interstate import or export of goods or services, or discriminatorily tax the performance of business activities, such as manufacturing, sales or services, on the basis of some interstate element.

An investment tax credit, one tied to the dollar amount of investment in in-state property, is not a tariff-like measure. Although such an investment helps to encourage increased local business activity, the credit bears no necessary relation to the manufacturing or services performed, neither, locally nor in interstate commerce. Therefore, unless a statute further confines the credit to the dollar volume of such activity, or to the dollar amount of interstate sales, it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." Precisely for this reason the Court has essentially stated, *in dicta*, that investment tax credits and job incentive credits do not violate the dormant Clause, distinguishing them from those credits "allowed on an impermissible basis." *Westinghouse, supra*, at 407 n.12. A contrary conclusion would require a state to pay a portion of the cost of property invested in states in which it has no sovereign interest and, thus, directly subsidize, not

the business activity conducted there, but the seeds for that state's future economic development. The Constitution, least of all the dormant Commerce Clause, does not require such a result.

In determining whether a tax credit, in its effect, discriminates against interstate commerce, this Court considers whether the credit evenhandedly apportions to the taxing jurisdiction the instate and out-of-state manufacturing, sales or other business activity. *See, e.g., Armco v. Hardesty,* 467 U.S. 638, at 644-645 (1984) ("A tax that unfairly apportions income from other states is a form of discrimination against interstate commerce.") Where the effect of a credit is to tax out-of-state manufacturing, services or sales at a higher effective rate than similarly situated instate activity, such a credit has been held to be discriminatory because it inversely apportions the out-of-state activity to the taxing jurisdiction. *See, e.g., Fulton v. Faulkner,* 516 U.S. 325, 327 (1996) (prohibition against inverse apportionment). Investment tax credits, which are awarded without regard to where the manufacturing or other business activity is performed, and without regard to the origin, destination or place of sale, do not discriminate against interstate business activity and, therefore, are not equivalent to tariffs in their effect.

Additional reasons militate against treating Ohio's investment tax credit as equivalent to a tariff. Under Ohio's business income apportionment scheme, which includes a property factor among its three apportionment factors as a proxy for business activity, a taxpayer who invests in Ohio property eligible for the credit is not similarly situated to a taxpayer who invests in property located outside of Ohio. The former receives a credit based upon the same investment in property that increases its instate apportionment percentage. The latter is denied the credit, but also decreases its taxable presence under the state's property factor by investing in such property outside

of the state. As the two taxpayers are not similarly situated in relation to Ohio's taxing scheme, there can be no forbidden discrimination in such a case.

The Sixth Circuit's decision, which invalidated Ohio's investment tax credit on the grounds that it encourages instate investment and the development of local business at the expense of other states, misapplies this Court's dormant Commerce Clause jurisprudence in several respects. Under the Court's "internal consistency" test, a sister state having a sovereign interest in the investment would be deemed to have enacted the identical taxing scheme and, therefore, would be deemed to provide the identical credit, resulting in no mal-apportionment nor discrimination. The Sixth Circuit's holding is incompatible with the internal consistency requirement, because it produces multiple credits for a single instate investment, and places interstate commerce at a tremendous advantage over wholly intrastate commerce. Although there are legitimate policy questions regarding the efficacy of investment credits, Congress is best-suited to resolve these under its affirmative Commerce Clause authority. The Sixth Circuit's decision extends the dormant Commerce Clause well beyond its present function, to protect interstate markets against discrimination, substituting a new standard which forbids states from enacting non-discriminatory tax laws encouraging local investment unless those laws also subsidize the economic development of all other states. The decision, therefore, should be reversed.

## ARGUMENT

### I. INVESTMENT TAX CREDITS ARE NOT EQUIVALENT TO TARIFFS UNDER THE COURT'S DORMANT COMMERCE CLAUSE JURISPRUDENCE, WHICH PROHIBITS BARRIERS AGAINST INTERSTATE TRADE AND DISCRIMINATION AGAINST INTERSTATE MARKETS, BUT DOES NOT REQUIRE A STATE TO SUBSIDIZE, THROUGH ITS TAX LAWS, THE PRIVATE INVESTMENT IN, AND THE ECONOMIC DEVELOPMENT OF OTHER STATES.

The Commerce Clause, which provides that "the Congress shall have Power ... to regulate Commerce with Foreign Nations, and among the several States," vests Congress with plenary authority to regulate interstate Commerce. *Gibbons v. Ogden,* 22 U.S. 1, at 193, 196 (1824); *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769 (1945). The explicit grant of authority pursuant to this Clause is broad, and gives Congress the power to regulate virtually every activity that exerts an influence on interstate Commerce. *Wickard v. Filburn,* 31 U.S. 111 (1942); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964). The Court has also recognized that the 10th Amendment reserves to each state the limited authority to regulate interstate commerce in the course of exercising its police and taxing powers, but only to the extent that each state's interest is sufficiently local in nature so as not to interfere with Congress' explicit authority. *Cooley v. Board of Wardens,* 53 U.S. 299 (1851) (10th Amendment reserves to the states the power to regulate interstate commerce so long as the effect is sufficiently local in nature so as not to require a uniform national rule).

The "negative" or "dormant" Commerce Clause, thus, appears nowhere in the text of the Constitution, but has been construed by the Court as a necessary implication

of the delicate balance the Commerce Clause strikes between the Constitution's broad grant of authority to Congress to regulate the national economy and the states' retention of their police and taxing powers, even where the exercise of those powers affects interstate commerce. The dormant Commerce Clause achieves this balance by assuring that states do not impede interstate commerce beyond their local interests and, in effect, step into Congress's role of regulating the national economy. *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) (where the Court balanced local against Federal interests in striking down a local regulation); *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (where the Court prescribed a four-part test to balance those interests under taxing statutes).

Given the limited purpose of the dormant Commerce Clause, and the Court's reluctance to involve itself in matters properly within Congress's domain, the Court has carefully confined the dormant Commerce Clause to serve one function. It "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (import tariff on milk). The dormant Commerce Clause comes into play only where a state tax or regulation either discriminates against interstate markets or unduly burdens competition in those markets tantamount to discrimination. The dormant Commerce Clause protects individual taxpayers and the economies of other states against a state tax or regulation only insofar as the tax or regulation discriminates against the flow of goods and services in interstate markets because "the dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *General Motors v. Tracy*, 519 U.S. 278, 300 (1997). *See also, City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (statute banning other states from using local landfills discriminated against the flow of commerce across state lines).

It will be shown, *infra*, that this Court has construed the dormant Commerce Clause as prohibiting taxes that have the effect of a tariff, discriminating against goods and services in interstate markets. The Court has never held a tax discriminated against interstate commerce except when it amounted to a tariff. The Sixth Circuit decision, holding invalid a tax credit which applied without regard to where goods or services were produced, marketed or sold, thus, significantly expands the dormant Commerce Clause beyond its present scope.

**A. The Court has carefully confined the scope of the dormant Commerce Clause to tariff-like measures, those which discriminate against goods and services in interstate markets. The Sixth Circuit's decision expands the dormant Commerce Clause and is incompatible with this body of case law.**

This Court has invoked the dormant Commerce Clause only to protect, against discrimination, interstate business transactions and the interstate business operations incident to those transactions. "[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Camps Newfound v. Town/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997). The applicability of the dormant Commerce Clause has, thus, been limited to discriminatory measures that penalize business activities when those activities cross state lines. Since these measures amount to import and export tariffs in their end result, the Court has described tariffs as "the paradigmatic example of a law discriminating against interstate commerce." *West Lynn Creamery, supra*, at 193.

A review of each of the Court's modern dormant Commerce Clause decisions invalidating state taxes demonstrates that each tax was, in reality, a tariff on interstate sales, manufacturing, or services. *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S.

318, 331-332 (1977) (tariff on interstate stock transfers); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (import tariff on natural gas); *Armco, supra* (import tariff on out-of-state manufacturing); *Westinghouse Electric, supra* (tariff on out-of-state export shipments); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (import tariff on liquors); *Tyler Pipe Industries, Inc. v. Washington*, 483 U.S. 232 (1987) (export tariff on instate manufacturing); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988) (import tariff on ethanol production); *West Lynn Creamery, supra* (import tariff on milk); *Fulton, supra* (tariff on doing an interstate business); *Camps Newfound, supra*, at 580-81 (export tariff on services).

Each of the above tariffs benefited instate economic interests such as local stock exchanges, manufacturers, sellers, exporters and consumers by imposing a higher effective tax rate on their out-of-state competitors. The dormant Commerce Clause applies only where a taxing measure impedes the flow of commerce across state lines, adversely impacting competition in the interstate markets for those goods and services. "This negative command prevents a State from ...placing burdens on the flow of commerce across its borders that commerce wholly within its borders would not bear." *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419, 2423 (2005).

In one of its more recent dormant Commerce Clause decisions the Court highlighted some of the adverse effects of tariffs on the national economy, employing language that, when taken out-of context, might erroneously suggest that the Court would apply the dormant Commerce Clause to state taxes that do not amount to tariffs. In *West Lynn Creamery, supra*, the Court invalidated, under the dormant Commerce Clause, a tax on all milk production coupled with a rebate of the tax only to local milk producers, the effect of which discriminated against the import of out-of-state milk. The *West Lynn Creamery* Court noted that one

negative consequence of the Massachusetts scheme was that it "artificially encourages in-state production even when the same goods could be produced at lower cost in other States." *Id.*, 512 U.S., at 193. While this, and several similar statements in the Court's opinion, summarized *at* 207-208 (Scalia, J., concurring in the judgment), were illustrative of some of the adverse effects of such a scheme on the national economy, these statements were not the holding of the case. The Court invalidated the Massachusetts scheme solely on the grounds that it operated as an import tariff on milk: "Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products." *Id.*, at 194.

*West Lynn Creamery*, therefore, cannot be plausibly read to hold that a taxing statute which "artificially encourages in-state production even when the same goods could be produced at lower cost in other States" is invalid, regardless of whether it operates as a tariff. The Court began its statement of the applicable law by presupposing that the Massachusetts scheme was a tariff, explaining that a tariff is "[t]he paradigmatic example of a law discriminating against interstate commerce." *Id.*, at 193.

The Commerce Clause does not, by its own force, prohibit a tax credit that "artificially encourages in-state production" at the expense of out-of-state production. *Westinghouse Electric, supra,* 466 U.S., at 407 n.12:

> We reiterate that it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis ... We do not 'hold that a State may not compete with other States for a share of the interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of such competition no State may discriminatorily tax the products manufactured or the business operations

> performed in any other State.' [*Quoting Boston Stock Exchange, supra.*]

Ohio's investment tax credit, like similar credits enacted by many states to attract business capital investment, does not "discriminatorily tax the products manufactured or the business operations performed in any other State." It is awarded without regard to where the goods are produced, *see Armco, supra, New Energy, supra,* shipped, *see Westinghouse Electric, supra,* or sold, *see Tyler Pipe, supra,* and without regard to where any of the taxpayer's business operations incident to the production or sale of those goods are performed, *see Fulton, supra.*

The tax credits invalidated in *Armco, Tyler, and Fulton* each followed the same pattern, crediting a tax imposed on a strictly local activity against a tax imposed on a different activity conducted in interstate commerce. *Armco, supra* (manufacturing tax credited against wholesale tax resulted in tariff on out-of-state manufacturers). *See also, New Energy, supra* (invalidating a credit against the sales tax for the instate production of ethanol); *Westinghouse Electric, supra* (discriminatory credit limited to exports shipped from within the state).

The investment tax credit does not credit one tax against another tax, as in *Armco, Tyler, and Fulton*, and is not a credit for the performance of a local activity, as in *New Energy* and *Westinghouse Electric.* Instead, it is a credit for a private investment. The state legislature, in effect, determines that some or all of a taxpayer's out-of-pocket expenditure for an instate private investment serves a public purpose, erecting local property that, it is hoped, will provide jobs and a future tax revenue stream. The state's legislature, however, has no comparable sovereign interest in paying the cost of a private investment in property located in another state. It would be nothing short of waste for the state's legislature to credit a private expenditure for a capital investment located in another state that does nothing to advance the public interest of its own

state. While it is within the province of that other state's legislature to choose to credit the cost of the property against its own tax in order to further its own economic development, the dormant Commerce Clause does not mandate that where a state chooses to use its tax laws to pay the cost of an instate investment, it must then finance the economic development of the other 49 states.

The *Fulton* Court, thus, explained that because a state has no "sovereign interest" in taxing the income derived from business conducted in another state, it cannot justify a discriminatory property tax on corporate stock that increases to the extent that the corporate issuer does business outside of the state under the rationale that, by doing so, the corporation pays a reduced corporate income tax. *Fulton, supra,* at 334. Because a state has no sovereign interest in a corporation's out-of-state business activities, the state is not entitled to be compensated for its inability to tax those activities.

By the same reasoning, Ohio has no sovereign interest in paying the cost of private investments in property located in other states. While the legislatures of those other states can conceivably decide that private expenditures to erect new property located in their respective jurisdictions advance the public interest by providing local employment and tax revenues, the choice of whether or not to credit the cost of that property against state taxes vests exclusively in those other state legislatures having a sovereign interest in the property. For Ohio to credit the cost of an investment in out-of-state property against its taxes would be nothing short of wasting public funds, as its legislature has no sovereign interest in paying the cost of an investment in property located in another state. *cf. Brett Abbott v. City of Parma,* 112 Ohio App.3d 570, 574-575 (Ct. of Appeals Ohio, 8th Appellate Dist. 1996) (waste of public funds only where expenditure bears no rational relation to a public purpose). The state in which the property is located provides the requisite "protection,

opportunities, and benefits," *see Wisconsin v. J.C. Penney*, 311 U.S. 435, 444 (1940) to justify taxing it, and that same sovereign interest in the property justifies that state to credit its cost against the state's business taxes so as to encourage such an investment and the potential local economic benefits that might flow from the development of the property.

Where a state attempts to tax an activity over which it has no sovereign interest, such as out-of-state manufacturing, out-of-state sales or out-of-state services, the state tax violates the requirement that it must be "fairly apportioned" to the taxing jurisdiction. *Armco, supra, at* 644-645. In *Complete Auto, supra,* this Court held that a state tax comports with the dormant Commerce Clause where it (1) is applied to an activity with a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. For a state tax to be "fairly apportioned" to the taxing state, it must be, both, "externally consistent" and "internally consistent." *Container Corporation of America v. Franchise Tax Board,* 463 U.S. 159, 169 (1983). A state income tax apportionment scheme is "externally consistent," where it "actually reflect[s] a reasonable sense of how income is generated." *Id.* The external consistency test is, for the most part, delineated by the requirements of due process and, as such, requires no more than a rational relationship between the amount of the tax and the net income economically earned within the taxing state. *Moorman Manufacturing C. v. Blair,* 347 U.S. 267, 274 (1978) (taxpayers must prove, by "clear and cogent evidence" that a state apportionment scheme is "inherently arbitrary"). Ohio's investment tax credit does not result in the apportionment to Ohio of income economically earned in other states. Ohio, like many states, uses a three-factor formula to apportion income within and without the taxing jurisdiction. The investment tax credit does not affect that formula, and does not otherwise cause Ohio's tax to

overreach beyond its jurisdiction to tax the income earned in other states. Therefore, Ohio's investment tax credit does not violate "external consistency." To the extent that Ohio's investment tax credit interacts with the property factor of Ohio's three-factor apportionment formula, it will be addressed, *infra*, in Sub-Point B.

Ohio's investment tax credit also comports with the "internal consistency" requirement of "fair apportionment." *Container Corp., supra*, at 169. A taxing scheme is internally consistent where the application of the identical scheme by every state does not result in multiple taxation. *Oklahoma v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). For example, *Armco, supra*, held that West Virginia's credit against its wholesale tax limited to instate manufacturing violated the internal consistency requirement. Under that scheme, out-of-state manufacturers were subject to two taxes, a manufacturing and a wholesale tax, while instate manufacturers paid only a manufacturing tax. *Id.*, at 644. The tax violated the internal consistency requirement by subjecting products manufactured in Ohio and sold in West Virginia to multiple taxation not born by products manufactured and sold in West Virginia. *Armco*, at 644-645: "A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce."

The investment tax credit does not violate the internal consistency requirement for fair apportionment. In fact, the Sixth Circuit's reasoning that if Ohio grants a credit for the cost of an instate investment it must then credit the cost of investments made in the other 49 states, is incompatible with, and diametrically opposed to, the rationale underlying this Court's internal consistency jurisprudence. Where a state denies a tax credit on the basis of an interstate activity over which the state has no sovereign interest, it violates the internal consistency requirement because of the effect of taxing out-of-state

activity more heavily than instate activity. *Armco, Tyler, Fulton.*

A necessary corollary to the requirement that a state must have a sovereign interest in an activity in order to tax it, is that a state is not required to pay the cost of investments in other states in property in which it has no sovereign interest. This corollary derives directly from the internal consistency requirement. If the other state in which the property investment is made adopts the "identical" scheme as Ohio's, *see Jefferson Lines, supra,* it will also offer an investment tax credit. The internal consistency requirement would, thus, be satisfied, the tax "fairly apportioned" with no discrimination. *Armco, supra,* at 644-645. More significantly, the internal consistency requirement would properly assign the responsibility for granting the investment tax credit to the state having a sovereign interest in paying the cost of the investment to further its own economic development. The analytical framework supporting such a conclusion also forecloses an interpretation of the dormant Commerce Clause that forces a state legislature to waste taxpayers' funds by paying for the erection of property located in other states, for the sole reason that it chooses to limit its expenditures to projects that benefit its own citizenry.

Furthermore, when the investment tax credit is viewed from the perspective of the internal consistency requirement, with its focus limited to the question "What if every state repeated this identical taxing scheme?", it becomes apparent that a taxpayer should be entitled to only one such credit for its instate investment. Although the purpose of the internal consistency requirement is to avoid multiple taxation, its logic, consistently applied, extends also to multiple credits. Thus, if Ohio and State A are presumed to have the identical corporate income tax scheme, it would be illogical for a taxpayer to expect to receive an investment tax credit for investing in Ohio property from, both, Ohio and State A. However, that is

precisely the result mandated by the Sixth Circuit's decision – if State A grants taxpayers a credit for the cost of new plant constructed in State A, it must also grant a credit for the new plant constructed in Ohio, or violate the dormant Commerce Clause. Under the "cloning" of tax statutes inherent in the internal consistency test, *Jefferson Lines, supra*, both Ohio and State A would be presumed to offer a credit for the investment in Ohio property, resulting in multiple credits for the same investment. In fact, the internal consistency test would presume that a taxpayer doing business in 50 states would receive 50 investment tax credits for that single investment in Ohio property.

Were this Court to read such a requirement into the dormant Commerce Clause, it would place interstate commerce at a tremendous advantage over wholly intrastate commerce (because a taxpayer doing business only in State A would be entitled to only one credit for its investment in property located in State A). However, as this Court has repeatedly held: "it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-624 (1981), quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S., at 254. The internal consistency requirement, thus, brings into clear view the inappropriate twist to this Court's dormant Commerce Clause jurisprudence that would result from adopting respondents' position in this case.

Although this Court has consistently held that a state tax discriminates against interstate commerce only where it has the effect of a tariff, the Sixth Circuit has rejected such a limitation on the scope of the dormant Commerce Clause. *Cuno*, 386 F.3d, at 745. In summarizing petitioners' position the Sixth Circuit accurately summarized this Court's decisions:

> According to their [petitioners'] theory, the only tax credits and exemptions that would run afoul of the Commerce Clause fall into two categories: those that function like a tariff by placing a higher tax upon out-of-state business or products and those that penalize out-of-state economic activity by relying on both the taxpayer's in-state and out-of-state activities to determine the taxpayer's effective tax rate.

The Sixth Circuit, however, rejected such a limitation on the dormant Commerce Clause:

> Although it is possible to fit certain of the Supreme Court's cases into this framework, it is clear that the Court itself has not adopted this approach in analyzing dormant Commerce Clause cases, undoubtedly because it rests on the distinction between laws that benefit in-state activity and laws that burden out-of-state activity.

*Id.*

The Sixth Circuit provides no authority in support of its conclusion that the dormant Commerce Clause would hold a state tax to be discriminatory even where it does not amount to a tariff. Both of the cases on which the Sixth Circuit relies, *Bacchus Imports, supra,* and *Westinghouse Electric, supra,* involved tariffs.

The Hawaii liquor tax invalidated in *Bacchus Imports* was a classic tariff, providing an exemption only for a locally-produced brand of wine, while taxing wine imported from other states at the full tax rate. The Court expressly identified Hawaii's tax as a form of "economic protectionism", 468 U.S., at 270, "because it had both the purpose and effect of discriminating in favor of local products." *Id.*, at 273. Hawaii's liquor tax was, thus, held

to violate the dormant Commerce Clause, because "in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." (Internal quotes omitted.) *Id.*, at 272.

Similarly, in *Westinghouse Electric*, the Court held New York's DISC Export Credit facially discriminated against exports shipped from other states in favor of exports shipped from New York, *Id.*, at 400, violating the cardinal rule that "in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.*, at 406 n. 12.

More significantly, the validity of Ohio's tax credit does not turn on the sophistic distinction "between laws that benefit in-state activity and laws that burden out-of-state activity." *Cuno*, 386 F.3d, at 745. Rather, Ohio's credit is not awarded on the basis of where goods are produced, marketed or sold, or based upon the location of the performance of any business operation ancillary to the flow of goods in interstate commerce. In short, it does not have the effect of a tariff because it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Westinghouse Electric*, *supra*. For Ohio's investment tax credit to be held to discriminate against interstate commerce, it must do more than merely advance the economic development of Ohio without comparably advancing other state's economies. It must discriminatorily tax the flow of goods in interstate commerce on the basis of some interstate element. *Fulton*, *supra*, 516 U.S., at 331: "a State may not discriminate between transactions on the basis of some interstate element" [internal quotes omitted].

Consistent with this body of decisional law holding that a state tax discriminates against interstate commerce only where it has the effect of a tariff, this Court has essentially stated, in *dicta*, that investment tax credits and

job incentive credits do not violate the dormant Commerce Clause because they are not "allowed on an impermissible basis." *Westinghouse Electric, supra,* 466 U.S. 388, 407 n.12 (1984):

> The Tax Commission seeks to classify the tax credit at issue here as ... similar to ... *enactment of job-incentive credits and investment tax credits* ... We reiterate that it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, i.e., the percentage of a specific segment of a corporation's business that is conducted in New York ... [Emphasis added.]

The Court's *dicta* provided guidance to states concerning the scope of its decision, explaining that not all tax credits that encourage economic development are prohibited by the dormant Commerce Clause, only protectionist measures that award tax credits on the basis of the amount of business a taxpayer conducts locally as compared with the amount that taxpayer conducts in interstate commerce. The *dicta* regarding investment tax credits and job incentive credits would have had little value in providing guidance to States concerning the validity of their existing programs if it could be read to mean that "job-incentive credits and investment tax credits," as those terms were commonly understood at the time, by their very nature discriminate against interstate commerce. Rather, the clear implication of the *dicta* is that such credits do not generally violate the dormant Commerce Clause, and will be invalid only where a statute further limits such credits based on the amount of business activity, such as manufacturing, sales, marketing, shipping, etc., the taxpayer performs within the state.

The clear implication of *Westinghouse Electric,* therefore, is that "job-incentive credits and investment tax credits" do not offend the Commerce Clause because they

are not "allowed on an impermissible basis." The Sixth Circuit disregarded the holding in *Westinghouse Electric* that New York's credit was invalid because it discriminated against business transactions on the basis of an interstate element, i.e., because it had the effect of a tariff.

It is undisputed that a tax that benefits intrastate business transactions but does not provide the same benefit to interstate business transactions discriminates against interstate commerce. The form of the discrimination against interstate commerce is irrelevant. The inquiry is limited to whether the state tax or regulation favors intrastate goods or services over interstate goods or services. It does not matter whether the tariff favors instate manufacturers over their out-of-state competitors, *Armco, supra, New Energy, supra*, instate consumers of goods over the out-of-state market for those same goods, *Tyler Pipe, supra*, or instate consumers of services over the export market for those same services, *Camps Newfound, supra.* A protectionist statute violates the dormant Commerce Clause regardless of the means it uses to accomplish its end.

Ohio's investment tax credit draws no distinction between goods and services marketed in interstate commerce, and those marketed in intrastate commerce. A taxpayer who erects a plant outside of Ohio will be denied a credit for the cost of that plant against its Ohio taxes regardless of whether the goods produced by that plant are sold in interstate commerce, are sold strictly in intrastate commerce, or are produced for self-consumption. The credit, moreover, bears no relation to the amount of goods produced at a plant receiving the credit, or whether any of the goods produced there are actually sold. In sum, Ohio's credit bears no relation to the amount of business, or the percentage of the total business, conducted by a taxpayer at any location. *Compare Westinghouse Electric, supra.*

The rationale underlying the Sixth Circuit's holding that Ohio's investment tax credit discriminates against

interstate commerce, does not take into account the effect of the credit on interstate markets nor on competition in those markets. Instead, it focuses on the individual corporate taxpayer, and that taxpayer's tax situation if it invests in Ohio property or in property located in another state. *Cuno, supra,* 386 F.3d, at 743: "Specifically, any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere."

The Sixth Circuit's comparison between an individual taxpayer choosing to invest within and without Ohio is incorrect as a matter of law. The relevant comparison under the dormant Commerce Clause is between an instate business (or consumer) and its out-of-state competitor: "the dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *General Motors v. Tracy, supra,* 519 U.S. 278, 300 (1997). The Court will not inquire into "the extent of such competition" in the market, but will limit its inquiry to whether there is at least some competition between the locally produced product and an out-of-state product. *Bacchus Imports, supra,* 468 U.S., at 269.

The Sixth Circuit's comparison between one and the same taxpayer, instead of between competitors in the marketplace, therefore, is irrelevant to the issue of whether Ohio's investment tax credit is a tariff. The decision, however, also notes, *Cuno, supra,* at 743: "Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax."

The Sixth Circuit's reference to "competitor" is misleading, however, because it addresses an issue that is not presented by Ohio's investment tax credit, which is allowed without regard to where goods or services are produced, marketed or sold. Ohio's investment tax credit is denied to any investment in property located outside of Ohio, even if it ultimately produces goods sold in purely intrastate commerce or for self-consumption. Since Ohio's tax credit does not discriminate against "markets or participants in markets," *Tracy, supra,* the Sixth Circuit's inquiry into the comparative tax consequences to an individual corporate taxpayer is the wrong comparison as a matter of law.

There is no dispute that the use of investment tax credits (and similar credits for the costs of instate business investment) raise legitimate policy questions concerning the extent to which states should use their taxes to compete, within the confines of the dormant Commerce Clause, for a share of interstate business. Investment tax credits, however, are not the sole means by which states legitimately use their tax laws to encourage instate investment and, thus, enter the fray of competing with other states for a share of jobs and capital. Some states have switched their franchise tax apportionment formulas from the traditional three-factor formula to a single-factor sales formula, the effect of which is to encourage taxpayers to shift the location of their investments in property and wages from states that employ the three-factor formula. *See Moorman, supra,* 347 U.S. 267 (1978). Nevertheless, in spite of the competition for jobs and capital fostered by single-factor sales formulas, this Court has held that such apportionment formulas do not discriminate against interstate commerce, and has refused to extend its inquiry under the dormant Commerce Clause beyond the question of discrimination when considering the constitutionality of such formulas. *Moorman, supra.* Congress, pursuant to its affirmative Commerce Clause authority, is the proper forum to resolve these legitimate questions of policy.

The Court does not construe its authority under the dormant Commerce Clause as co-extensive with Congress' affirmative grant of authority. Although the Court in *Camps Newfound, supra,* 520 U.S. 564, 574 (1997), stated that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation ...", the Court's statement must be read in its proper context. In that case the Court invalidated a property tax that discriminated against the sale of camp services to out-of-state consumers. The state had argued that a property tax is strictly a local matter and not subject to Commerce Clause scrutiny. In rejecting that argument, the Court made clear that its focus was limited to the practical effect of the tax on interstate commerce, regardless of the inherently local nature of the activity.

The clarification was necessitated by the narrower definition of interstate commerce the Court had previously applied to dormant Commerce Clause cases prior to its landmark decision in *Complete Auto, supra. See, Katzenbach, supra, 379 U.S.*, at 302 (noting the double standard that applied between the two lines of cases). Prior to *Complete Auto,* the Court had interpreted the scope of interstate commerce more narrowly in its tax cases to avoid striking down state taxes under the formalistic approach in effect at that time. *See Commonwealth Edison v. Montana,* 453 U.S. 609, 617, 625 (1981) (where the Court rejected a formalistic definition of commerce in favor of a practical effects-oriented economic analysis). The Court's statement in *Camps Newfound* reiterated that the same practical approach to discrimination applied under its dormant Commerce Clause tax jurisprudence to dispel any notion that a property tax that operated to discriminate against the flow of services across state lines could serve as a loophole under that line of cases.

The *Camps Newfound* majority made it clear, however, that it did not extend the scope of the dormant

Commerce Clause beyond tariff-like measures, holding that Maine's credit: "functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that principally serve them." *Camps Newfound*, at 580-581.

In sum, Ohio's investment tax credit does not violate the dormant Commerce Clause because it is not a tariff-like measure. Therefore, it is wholly unnecessary to justify the investment tax credit as a "subsidy." *Cuno*, at 746. It is, however, a worthwhile exercise to briefly note the similarity between Ohio's investment tax credit and a direct subsidy under the Court's dormant Commerce Clause jurisprudence. The Court described the standard for concluding a measure is a direct subsidy in *New Energy*, *supra*, 486 U.S. 269, at 278:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the state's regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does. [Emphasis supplied.]

In *New Energy*, it was clear that the meaning the Court assigned to the "regulation of interstate commerce" was the flow of commerce across state lines, in that case, the importation of out-of-state produced ethanol. It would have been inconsistent with its prior jurisprudence for the Court to have expanded the scope of the dormant Commerce Clause beyond tariff-like measures, and there is no indication that it intended to do so by the explicit language it carefully employed in *New Energy*. Therefore, although it is unnecessary to justify Ohio's investment tax credit as a "direct subsidy," both are supported by the same analytical framework in the sense that neither are tariffs

falling astray of the narrow scope of the Court's authority under the dormant Commerce Clause.

**B. A taxpayer that invests in property located in Ohio is not similarly situated, under Ohio's franchise tax, to a taxpayer that invests in property located outside of Ohio. The Sixth Circuit erroneously assumed that such a taxpayer increases its tax burden and, therefore, erroneously found facial discrimination where none was present.**

The Sixth Circuit invalidated Ohio's investment tax credit, erroneously concluding that (*Cuno*, at 743):

> [A]ny corporation currently doing business in Ohio, and therefore, paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere.

The Sixth Circuit, however, failed to take into account Ohio's franchise tax scheme in its entirety. Ohio employs a three-factor apportionment formula consisting of the average of the ratios of a taxpayer's Ohio property divided by its total property everywhere, its Ohio payroll divided by its total payroll everywhere, and its Ohio sales divided by its total sales everywhere. Ohio Rev. Code section 5733.05(B)(2). Ohio's is the standard three-factor formula adopted by many states. Pomp and Oldman, State and Local Taxation (4th Ed. 2000), at pp. 10-12.

A corporate taxpayer that invests in property located in Ohio increases the ratio of its Ohio property to its everywhere property and, thus, increases its taxable presence in Ohio. The increased apportionment percentage is applied to the taxpayer's worldwide income derived from

its unitary business. *See, e.g., Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983) (upholding a state's authority to apportion a corporate taxpayer's income derived from its worldwide unitary business). Thus, the more extensive a taxpayer's worldwide operations constituting its unitary business, the greater the income derived from those worldwide activities, the greater the tax effect that results from an increase to the taxpayer's worldwide apportionment ratio.[1] The Sixth Circuit erroneously assumed that a taxpayer who invests in Ohio property would reduce its tax liability, limiting its inquiry to the investment tax credit and, thus, ignoring the tax increase under Ohio's property factor from investing in that property.

Similarly, a taxpayer that invests in property outside of Ohio does not, as the Sixth Circuit erroneously assumed, "receive no ... reduction in tax liability." *Cuno*, at 743. Rather, an investment in property located outside Ohio increases the denominator of the property factor without any decrease to the numerator.[2] It, therefore, decreases the property factor and the taxpayer's taxable presence in Ohio. The Sixth Circuit clearly fails to take into account the effect of the property investment on the taxpayer's apportionment of its worldwide income, even though it can be quite significant depending upon the taxpayer's pre-apportionment worldwide income base.

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[1] For example, in *Container, supra*, at 174-175, the net effect of including the taxpayer's income derived from its worldwide operations in the tax base was to increase its tax liability, even though its worldwide apportionment percentage decreased. Each percentage point of the taxpayer's reduced apportionment percentage, thus, had a proportionately greater tax effect when applied to the increased worldwide tax base.

[2] *Id.*

Under Ohio's apportionment scheme, a taxpayer that invests in property located outside of Ohio and, thus, decreases its property factor and base taxable income figure, is not similarly situated to a taxpayer that invests in property located in Ohio and, by doing so, increases its property factor and base taxable income figure.[3] A state tax discriminates against interstate commerce only where two taxpayers are otherwise similarly situated in relation to the taxing statute, *Westinghouse, supra,* at 400, a standard the Sixth Circuit expressly noted when it compared "two businesses, otherwise similarly situated ..." *Cuno,* at 743. There is nothing in the Sixth Circuit's opinion to suggest that it considered the totality of Ohio's franchise tax scheme when evaluating the tax consequences under its dormant Commerce Clause discrimination analysis. Its analysis strongly suggests that it failed to take into account the effect of the property factor in determining the net effect of an investment in property within and without the state.

The Sixth Circuit's failure to consider Ohio's franchise tax computation in its entirety, and limit its inquiry only to one isolated step in that computation was reversible error, violating the "cardinal rule that a statute is to be read as a whole." *Wash. State Dep't of Soc. & Health Services v. Guardianship Estate of Keffler,* 537 U.S. 371, 385 (2003). The effect of Ohio's investment tax credit should not have been removed from its proper context, the entire tax computation, inclusive of the apportionment factors, of which it is an inseparable part. *McCarthy v. Bronson,* 500 U.S. 136, 139 (1991) (statutory language

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[3] *Id.* In determining whether an apportioned income tax discriminates against interstate commerce, the relevant figure is the taxpayer's "base taxable income," which is the taxpayer's income apportioned to the taxing jurisdiction by applying the taxpayer's three-factor apportionment percentage. *Westinghouse, supra,* at 400.

must be read in its proper context and not viewed in isolation). *See also, Westinghouse Electric, supra,* 466 U.S., at 400 (where the Court considered New York's export credit and apportionment scheme in its entirety).

Each taxpayer has its own individual tax profile, varying in the scope and extent of its worldwide unitary business, the amount of the net income derived from that unitary business, and the relationship of that income to its worldwide apportionment factors. The Sixth Circuit's failure to consider the overall effect of investing in Ohio property on each of those components of Ohio's franchise tax computation made it impossible for that court to conclude that each taxpayer's investment tax credit would always exceed the incremental tax from increasing its Ohio property factor, regardless of the taxpayer's worldwide income.

Respondents, moreover, bear a heavy burden to show facial discrimination, even under the Sixth Circuit's erroneous standard comparing the tax consequences of the credit for an individual taxpayer. *See United States v. Salerno,* 481 U.S. 739, 745 (1987) (taxpayer must establish that no set of circumstances exist under which the Act might be valid). Respondents have failed to show that all taxpayers who invest in the same dollar amount of property within Ohio would experience a net tax decrease of their Ohio franchise tax liability as compared with the same dollar investments in property located outside of Ohio.

Note that the above analysis does not depend upon whether a state employs the standard three-factor formula or a single-factor sales formula. The dollar amount of property a taxpayer employs in its business is a proxy for a taxpayer's capital intensive activities, such as manufacturing, only where the state's legislature chooses such an apportionment scheme. Unlike a taxpayer's wages and sales which, standing alone, reflect a specific business operation or activity (i.e., services performed or sales), a taxpayer's investment in property in a particular location

does not inherently locate an activity except by proxy. Where a state employs a single-factor sales formula, the state's legislature did not choose to treat a property investment as a proxy for business activity. Two taxpayers are, thus, similarly situated under a single-factor sales formula where both sell within the state or where both sell outside of the state. Where an investment tax credit is denied under such a scheme for the sole reason the property investment is located outside the state, such denial is completely unrelated to whether the goods are sold within or without the taxing state. A credit discriminates against interstate commerce under a single factor sales formula only where there is a necessary connection between the credit and the point of sale, a connection that, if present, would render the credit either an import or an export tariff.

## CONCLUSION

**II. SINCE OHIO'S INVESTMENT TAX CREDIT DOES NOT ERECT A BARRIER TO INTERSTATE TRADE IT DOES NOT OFFEND THE DORMANT COMMERCE CLAUSE, AND THIS COURT SHOULD REVERSE THE SIXTH CIRCUIT'S DECISION UNDER ITS DORMANT COMMERCE CLAUSE CASE LAW.**

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Nos. 04-1704 & 04-1724

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IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *Petitioner*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

WILLIAM W. WILKINS, ET AL., *Petitioners*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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IN THE

# Supreme Court of the United States

No. 04-1704

DAIMLERCHRYSLER CORPORATION, *Petitioner*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

No. 04-1724

WILLIAM W. WILKINS, ET AL., *Petitioners*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF AMICUS CURIAE OF NISSAN NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

## STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Ohio, like virtually all States, offers tax benefits and related incentives to both in-state and out-of-state businesses in order to foster local economic development and create jobs for state residents.[1] In particular, Ohio has enacted an investment tax credit ("ITC") that grants a non-

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

refundable credit against the State's corporate franchise tax to any taxpayer that "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by a particular date. Ohio Rev. Code § 5733.33(B)(1). *See* 04-1704 Pet. App. 38a.

*Amicus curiae* Nissan North American, Inc. ("Nissan") has a direct and substantial interest in this case, in which the Sixth Circuit held that the Ohio ITC violates the Commerce Clause, U.S. Const., art. I, § 8, cl. 3. Nissan is a global automobile company headquartered in Japan with major operations in North America, including operations within the Sixth Circuit. Nissan's plant in Smyrna, Tennessee, covers more than five million square feet and is one of the largest automobile production plants under one roof in the United States. Nissan manufactures more than 500,000 vehicles at the Smyrna plant each year, including its Xterra and Pathfinder SUVs, Frontier pickup trucks, Maxima sport sedans, and Altima mid-size sedans. As discussed below, *see infra* at 24-27, Nissan's Smyrna plant and its manufacturing facility in Decherd, Tennessee, have resulted in the investment by Nissan of billions of dollars in infrastructure and equipment in Tennessee as well as the creation of more than 10,000 high wage-paying jobs.

Nissan receives tax incentives from the State of Tennessee based, in part, on the extent of its investment in Tennessee and the full-time workers it employs there.[2] These incentives are part of a coordinated effort by the State to encourage the investment of high wage industries in new plants and equipment in Tennessee. Not only does that effort enjoy strong popular support, it has produced enormous economic dividends for the State. Although the Tennessee incentive scheme differs from the Ohio ITC invalidated by the Sixth

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[2] *See* Tenn. Code § 67-4-2009(4)(A) (providing excise tax credit of 1% percent of purchase price of industrial machinery purchased during tax period and located in Tennessee); *id.* § 67-4-2109(c)(2)(A) (providing $2,000 job tax credit against franchise and/or excise tax liability for each net new full-time employee hired in Tennessee).

Circuit in this case, the Sixth Circuit's decision nonetheless creates uncertainty for businesses such as Nissan that are considering investing in new facilities in Tennessee or other States.

As a major multi-national corporation with global sales, Nissan may consider investing not only in States and communities outside of the Sixth Circuit, but in other countries that may offer more favorable and reliable tax and economic incentives. Foreign competition for manufacturing jobs has become increasingly intense. Respondents' effort to "level the playing field" among the fifty States ignores the reality that the playing field is global, not national, and their attempt to level the field can only result in tilting it in favor of other countries. The decision below jeopardizes the ability of the United States to compete for foreign investment by offering tax incentives. If allowed to stand, the Sixth Circuit's decision will unavoidably affect Nissan's decisions regarding the location of and investment in its manufacturing facilities in the future.

Because of its strong interest in this Court's review of the decision below, Nissan filed a brief *amicus curiae* supporting petitioners at the certiorari stage of this case. The instant brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

## SUMMARY OF ARGUMENT

I. a. Respondents lack Article III standing to challenge the Ohio ITC in federal court. Most of the respondents are Ohio residents and taxpayers who claim injury based on their status as state taxpayers. These respondents cannot satisfy this Court's requirements for taxpayer standing because they have not alleged a direct injury, pecuniary or otherwise, or an injury distinct from that suffered by other taxpayers or citizens. Nor can these respondents satisfy the general "injury in fact" requirement because their alleged injuries are not concrete and particularized.

The injury alleged with respect to one Ohio respondent is the "slated" condemnation of its property. This respondent unsuccessfully attempted to halt the exercise of eminent domain through litigation, and its property has now been taken. This respondent therefore lacks standing because a favorable decision would not redress its injury.

The remaining respondents are Michigan residents and taxpayers who allege that, but for the Ohio ITC, petitioner DaimlerChrysler Corporation would have located its new plant in Michigan instead of Ohio. It is sheer speculation, however, whether the Michigan respondents would have directly benefited from the jobs and tax revenues a plant in Michigan would have generated. Furthermore, respondents do not allege—and there is no reason to believe—that a judgment rendered in their favor now would lead DaimlerChrysler to proceed to build a plant in Michigan.

b. Even if respondents had standing under Article III, their alleged injuries are not within the zone of interests protected by the Commerce Clause. The negative Commerce Clause protects the right to engage in interstate trade free from restrictive state regulation. But respondents' injuries relate to their status as taxpayers or, in one case, as a property owner injured by the exercise of eminent domain authority. Their injuries are not in the nature of a restriction on their ability to engage in interstate commerce free from state regulation.

In addition, under this Court's cases, a plaintiff seeking to challenge a state law on negative Commerce Clause grounds must have suffered financial or economic injury as either a competitor or a consumer in the marketplace. The Ohio ITC does not, however, cause pecuniary injury to respondents as competitors or consumers in the market.

II. The Ohio ITC does not violate the negative Commerce Clause. The several States, as sovereigns, have wide discretion with respect to the collection of taxes and the granting of tax exemptions. And granting exemptions for the purpose of promoting local industry is a common and historically rooted practice.

This Court has recognized in numerous cases that the negative Commerce Clause allows States to encourage investment and create jobs, including through the structuring of their tax systems. The Court has also indicated that a State may use low taxes and tax exemptions to induce industry to come to the State without violating the Commerce Clause.

The Ohio ITC applies only to activities taking place exclusively within Ohio, does not discriminate against interstate or out-of-state activities, and does not tax any activity taking place, even in part, outside of Ohio. The ITC is therefore a neutral, locally focused provision entirely consistent with the negative Commerce Clause, if it even implicates the Clause.

Federalism principles also support the Ohio ITC. The ITC encourages industry to invest in Ohio rather than other States and thus is an example of the interstate competition that federalism is designed to promote. And permitting States to compete for investment through tax credits is critical to the economic welfare of the States and the Nation, particularly in this era of global economic competition.

III. Nissan's own experience confirms the importance of state tax incentives to local investment and competition. The State of Tennessee provides various tax incentives to business, and such incentives contributed to Nissan's decision to locate in Tennessee its first automobile manufacturing plant in the United States. Since 1980, Nissan has invested $2.8 billion in Tennessee and created some 12,000 jobs.

## ARGUMENT

### I. RESPONDENTS LACK STANDING TO CHALLENGE THE OHIO INVESTMENT TAX CREDIT ON COMMERCE CLAUSE GROUNDS.

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or

of particular issues." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

The standing doctrine consists of both constitutional and prudential aspects.[3] To satisfy the minimum constitutional requirements for standing, a plaintiff must show (1) an "injury in fact," (2) a "causal connection between the injury and the conduct complained of," and (3) that a favorable decision is likely to redress the injury. *Defenders of Wildlife*, 504 U.S. at 560-561. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Furthermore, where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges"—that is, where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"—it becomes "substantially more difficult" for the plaintiff to establish standing. *Id.* at 562 (emphasis in original) (internal quotation marks omitted). This heightened standard for standing applies to respondents, who are complaining, not about the taxes they must pay, but about the amount of taxes that DaimlerChrysler pays.

A plaintiff cannot satisfy prudential standing requirements if the injury of which the plaintiff complains does not fall "arguably within the zone of interests to be protected" by "the constitutional guarantee in question"—here, the Commerce Clause. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). This Court has applied the "zone of interest" test in a previous negative

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[3] The standing doctrine's constitutional aspect derives from Article III: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (citation omitted). The doctrine's prudential aspects "are part of judicial self-government," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and reflect "judicially self-imposed limits on the exercise of federal jurisdiction." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

Commerce Clause case. *See Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *see also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987) (reaffirming the correctness of *Boston Stock Exchange*'s decision on standing).

### A. All Three Categories Of Respondents Lack Article III Standing.

As this Court has explained, "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen* v. *Wright*, 468 U.S. at 752. *See Warth* v. *Seldin*, 422 U.S. at 518 ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). Here, such a careful judicial examination of the Complaint demonstrates that none of the respondents satisfies the constitutional requirements for standing.

1. *The Ohio Respondents.* Most of the respondents are Ohio residents and taxpayers (Complaint ¶¶ 2, 4-6) whose claim of injury is based entirely on their status as state taxpayers. The Complaint alleges that the Ohio ITC "depletes the funds of the State of Ohio to which [they] contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on [them]." *Id.* ¶ 40. This allegation clearly is insufficient to confer standing upon the Ohio respondents. A state taxpayer attacking a state law as unconstitutional must show "that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Doremus* v. *Board of Ed. of Hawthorne*, 342 U.S. 429, 434 (1952) (internal quotation marks omitted). *See also ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 613-614 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.) ("[W]e have refused to confer standing upon a state taxpayer absent a

showing of 'direct injury,' pecuniary or otherwise.") (quoting *Doremus*). Here, the Ohio respondents have not alleged a direct pecuniary or other injury. Nor are their alleged injuries "distinct from that suffered in general by other taxpayers or citizens." *Id.* at 613. *See also Massachusetts* v. *Mellon*, 262 U.S. 447, 487 (1923). Finally, apart from the special limitations upon taxpayer standing, the Ohio respondents cannot satisfy the general "injury in fact" requirement because their alleged injuries are not "concrete and particularized." *Defenders of Wildlife*, 504 U.S. at 560.

2. *Kim's Auto.* The Complaint alleges that one of the Ohio respondents, Kim's Auto and Truck Service, Inc., "will be injured" by the Ohio ITC because its property "is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep plant project." Complaint ¶ 41. Kim's Auto attempted in litigation to halt the City's exercise of eminent domain authority but did not succeed. *See City of Toledo* v. *Kim's Auto & Truck Serv., Inc.*, 2003 WL 22390102 (Ohio Ct. App. 6th Dist. Oct. 17, 2003), *appeal not accepted for review*, 804 N.E.2d 42 (Ohio Mar. 3, 2004), *stay of property appropriation denied*, 811 N.E.2d 1148 (Ohio July 14, 2004), *cert. denied*, 125 S. Ct. 2988 (June 28, 2005). Kim's Auto lacks standing because a decision in favor of respondents will not redress the injury it alleged—the "slated" taking of its property has already occurred. *See Eastern Ky. Welfare Rights Org.*, 426 U.S. at 38 (plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision"). The eminent domain litigation having run its course, the City now owns the land, and the building that once stood on the property has been demolished.[4]

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[4] Under the Takings Clause, U.S. Const., amend. V, the owners of Kim's Auto were, of course, entitled to just compensation for the taking of their property for public use. A jury determined that $104,000 represented the fair market value of the property, and the Ohio Court of Appeals upheld that determination. *See Kim's Auto & Truck Serv., Inc.*, 2003 WL 22390102, at *2, *7-*8.

3. *The Michigan Respondents.* A few of the respondents are Michigan residents and taxpayers. *See* Complaint ¶ 3; Second Amended Complaint ¶ 3a. The Complaint alleges that the Ohio ITC injured the Michigan respondents because it was part of a "taxpayer subsidy package which induced DaimlerChrysler to continue to operate its plants in Toledo, rather than an alternative site which, upon information and belief, was to be located within the State of Michigan." *Id.* ¶ 42. The Complaint further alleges that "[i]f the plant or plants had instead been located in Michigan, they would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan [respondents] would have benefited." *Id.*

The Michigan respondents—who are residents and taxpayers of *Michigan* seeking to challenge an *Ohio* tax scheme—plainly lack Article III standing. Assuming *arguendo* that, but for the Ohio ITC, DaimlerChrysler would have built a new plant in Michigan rather than Ohio, it is entirely speculative whether the Michigan respondents would have directly benefited from any new jobs or tax revenues a DaimlerChrysler plant in Michigan would have generated. And "unadorned speculation will not suffice to invoke the federal judicial power." *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 44. Furthermore, the Complaint does not allege, and there is no reason to believe, that a judgment in favor of respondents rendered now would cause DaimlerChrysler to proceed to build a new plant in Michigan. *Cf. Allen* v. *Wright*, 468 U.S. at 758 ("[I]t is entirely speculative * * * whether withdrawal of a tax exemption from any particular school would lead the school to change its [discriminatory] policies."); *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 45-46 ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the [benefit] they desire."). Thus, the Michigan respondents cannot satisfy the standing requirements of Article III.

### B. Respondents' Alleged Injuries Are Not Within The Zone of Interests Protected By The Commerce Clause.

Even if respondents possess Article III standing, their alleged injuries are not within the zone of interests protected by the negative Commerce Clause. *See Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153; *Boston Stock Exch.*, 429 U.S. at 320 n.3; *see also Premier-Pabst Sales Co.* v. *Grosscup*, 298 U.S. 226, 227 (1936) ("One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him.") (citing *Heald* v. *District of Columbia*, 259 U.S. 114, 123 (1922)).

"The Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation." *Dennis* v. *Higgins*, 498 U.S. 439, 448 (1991). *See id.* at 449 ("[T]he Clause was intended to benefit those who * * * are engaged in interstate commerce.") (emphasis omitted). But respondents' alleged injuries are not in the nature of a restriction on their ability to engage in interstate commercial activity unfettered by state regulation but instead relate to their status as Ohio and Michigan taxpayers. Such injuries are not within the zone of interests protected by the negative Commerce Clause. *Cf. General Motors Corp.* v. *Tracy*, 519 U.S. 278, 300 (1997) ("The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.").[5] The injuries alleged by the Ohio respondents fail the "zone of interest" test for the additional reason that "[i]t is not a purpose of the Commerce Clause to protect state residents

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[5] Although the injury to Kim's Auto's automotive repair business may relate to commerce, the Complaint does not allege that Kim's Auto engages in interstate as opposed to intrastate commerce. Furthermore, that injury is the result of the City's exercise of eminent domain power, not the Ohio ITC. Thus, the injury sustained by Kim's Auto would seem to fall within the zone of interests protected by the Takings Clause, not the Commerce Clause. *See Kelo* v. *City of New London*, 125 S. Ct. 2655 (2005).

from their own state taxes." *Goldberg* v. *Sweet*, 488 U.S. 252, 266 (1989).

Furthermore, a review of this Court's negative Commerce Clause cases that address the issue of standing confirms respondents' lack of standing. Those cases indicate that, for a plaintiff to have standing to challenge a state law on Commerce Clause grounds, the plaintiff must have suffered financial or economic injury as either a competitor or a consumer in the marketplace.[6]

In *Boston Stock Exchange*, *supra*, regional stock exchanges located outside of New York challenged New York's tax on securities transactions as violative of the Commerce Clause. This Court held that the regional exchanges had suffered an "injury in fact" because the discriminatory New York tax "diverted business from their facilities to exchanges in New York." 429 U.S. at 320 n.3. The Court also held that the regional exchanges passed the "zone of interest" test because they were "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business." *Id.*

In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), liquor wholesalers challenged Hawaii's tax on wholesale liquor sales, alleging that the tax discriminated against interstate commerce by exempting two locally produced liquors. The State of Hawaii argued that the wholesalers lacked standing "because they have shown no economic injury from the claimed discriminatory tax," *id.* at 267, but this Court disagreed. Because the tax "increase[d] the price of their products as compared to the exempted beverages,"

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[6] In addition to the cases discussed hereafter, this Court has upheld the standing of States to bring suit under the negative Commerce Clause. *See Wyoming* v. *Oklahoma*, 502 U.S. 437, 446-450 (1992); *Maryland* v. *Louisiana*, 451 U.S. 725, 735-736 (1981). Those cases are of no help to respondents, however, because no State has challenged the Ohio ITC. On the contrary, at the certiorari stage of this case, 27 States and the District of Columbia filed a brief *amici curiae* in support of petitioners.

this Court concluded that the wholesalers were "surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

In *Franchise Tax Board of California* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990), two foreign companies brought challenges under the foreign Commerce Clause to California's accounting method for determining the locally taxable income of the companies' wholly-owned American subsidiaries. This Court held that the foreign companies had Article III standing, explaining that California's "method threatens to cause actual financial injury to [the companies] by illegally reducing the return on their investments in [their subsidiaries] and by lowering the value of their stockholdings." *Id.* at 336.

In *General Motors*, *supra*, General Motors challenged Ohio's natural gas sales tax scheme which discriminated against out-of-state sellers by exempting sales made by in-state sellers. This Court held that General Motors, which purchased almost all of its natural gas from out-of-state sellers, suffered "cognizable injury," and had standing, based upon its status as a consumer of out-of-state gas subject to the higher tax. The Court explained that General Motors had standing as a "customer [who] is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers." 519 U.S. at 286.

In contrast to the foregoing cases, the Ohio ITC does not "divert[ ] business" from respondents to out-of-state interests, as in *Boston Stock Exchange*. It does not have an "adverse competitive impact on their business" by raising the prices of their products, as in *Bacchus Imports*. It does not inflict "actual financial injury" on respondents as investors or stockholders, as in *Franchise Tax Board*. And it does not cause them to "pay[ ] more" as consumers purchasing a taxed good, as in *General Motors*. In short, the Ohio ITC does not cause pecuniary injury to respondents as competitors or consumers in the marketplace. Respondents therefore lack

standing to challenge the Ohio ITC under the negative Commerce Clause.[7]

Finally, *Heald* v. *District of Columbia*, *supra*, is also instructive with respect to respondents' lack of standing. There, a District of Columbia resident challenged the constitutionality of a property tax on the ground that the tax applied to nonresidents doing business in the District. This Court held that the challenger—who, as a District resident, was not subject to the tax on nonresidents—lacked standing to complain about that feature of the tax. Justice Brandeis' opinion for the Court explained that "one who would strike down a state statute as violative of the federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." 259 U.S. at 123. Here, respondents are not "within the class of persons" who may challenge the Ohio ITC on Commerce Clause grounds because they are not affected by the ITC either as competitors or consumers, and the "alleged unconstitutional feature" of the Ohio tax—*i.e.*, the purported Commerce Clause violation—does not cause any injury to them.

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[7] Courts of appeals have rejected the standing of plaintiffs who had far greater claim than respondents to be within the zone of interests of the negative Commerce Clause. *See, e.g.*, *National Solid Waste Mgmt. Ass'n* v. *Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 500 (5th Cir. 2004) (waste management companies challenging flow control ordinance as facially discriminatory held not within zone of interests of the Commerce Clause where their injury was "not related to any out-of-state characteristic of their business"), *cert. denied*, 126 S. Ct. 332 (2005); *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372, 1381-82 (8th Cir.) (consumers of waste disposal services challenging flow control ordinance held not within zone of interests of the Commerce Clause), *cert. denied*, 522 U.S. 1029 & 522 U.S. 1036 (1997).

## II. THE OHIO INVESTMENT TAX CREDIT DOES NOT VIOLATE THE NEGATIVE COMMERCE CLAUSE.

### A. The States Have Wide Latitude To Structure Their Tax Systems To Encourage Domestic Industry And Long Have Done So.

The starting point for analysis of respondents' challenge to the Ohio ITC must be the principle that "[t]he States have a very wide discretion in the laying of their taxes." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526 (1959). For "in taxation, even more than in other fields, [state] legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). As discussed below, the power to tax is an essential attribute of state sovereignty. *See infra* at 22.

The wide latitude possessed by States with respect to their tax structures extends to the selective granting of tax exemptions. "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation *and to grant exemptions*." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937) (emphasis added). "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, or to restrict or suppress the other." *Id.* at 512 (citations omitted).[8]

This Court has observed that "it is standard practice for States to grant [tax] exemptions to commercial entities" to promote local industry. *Department of Revenue of Ore.* v. *ACF Indus., Inc.*, 510 U.S. 332, 347 (1994). And that practice is as deeply rooted as it is common. More than a century ago, this Court noted that "the states vary materially in their systems of taxation. Each determines for itself what in its judgment is best for the interests of its people. * * * Some, in order to encourage certain industries, such as

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[8] As the party challenging the constitutionality of the Ohio ITC, respondents "carry the burden of showing that the tax deprives them of rights which the Commerce Clause protects." *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953).

manufacturing, make either general or special exemptions." *Florida Cent. & Peninsular R.R.* v. *Reynolds*, 183 U.S. 471, 476 (1902). *See also Salt Co.* v. *East Saginaw*, 80 U.S. 373, 378 (1871).[9]

The longstanding state practice of granting tax exemptions to encourage particular forms of industry was frequently challenged on equal protection grounds around the turn of the Twentieth Century. This Court repeatedly rejected such challenges and in so doing underscored the authority of states to engage in that practice. *See Quong Wing* v. *Kirkendall*, 223 U.S. 59, 62 (1912) (Holmes, J.) (rejecting equal protection challenge to state law taxing laundry business but exempting steam laundries; observing that "a state may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry"); *American Sugar Ref. Co.* v. *Louisiana*, 179 U.S. 89, 95 (1900) (upholding over equal protection challenge state law taxing sugar refining but exempting those who refine sugar from their own plantations as permissible "encouragement to agriculture"); *see also Florida Cent. & Peninsular R.R.*, 183 U.S. at 480 (noting that "if the state of Florida had deemed it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not have been adjudged in conflict with the 14th Amendment, even though thereby the burden of taxation upon other property in the state was increased.").

The fact that this longstanding state practice has gone without successful challenge until this case is *prima facie* evidence of the constitutionality of such exemptions. *Cf. Walz* v. *Tax Comm'n of New York City*, 397 U.S. 664, 678 (1970) (relying on "unbroken practice of according [property tax] exemption to churches" in rejecting Establishment Clause

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[9] *Salt Co.* involved a Michigan statute that encouraged in-state salt production by, among other means, granting a property tax exemption for all property used by any corporation or individual "for the purpose of boring and manufacturing salt in this State." 80 U.S. at 374.

challenge to such exemptions). As Justice Brennan wrote in *Walz*, the long history of a challenged practice, although "not conclusive of its constitutionality * * * is a fact of considerable import in the interpretation of abstract constitutional language." *Id.* at 681 (concurring opinion). That observation carries special force in the context of this case, because the language of the Commerce Clause "does not expressly prohibit the States from doing anything." *United States* v. *International Bus. Mach. Corp.*, 517 U.S. 843, 851 n.2 (1996). *See also Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (finding "significant" for purposes of interpreting the Commerce Clause the "absence of any previous challenge" to a state program designed to "encourage[e] local enterprise" of the sort then before the Court).

Since 1995, thousands of corporate taxpayers, including petitioner DaimlerChrysler, relying upon the Ohio ITC, have invested more than $30 billion in plants and equipment in Ohio. *See* 04-1704 Pet. 4. The substantial reliance interests at stake also caution against construing Congress' power to regulate interstate commerce as implicitly forbidding the ITC. *Cf. Quill Corp.* v. *North Dakota*, 504 U.S. 298, 317 (1992).

### B. This Court Has Repeatedly Recognized That States May Encourage In-State Investment Through Tax Incentives Without Violating The Negative Commerce Clause.

The District Court ruled in this case that holding the Ohio ITC unconstitutional would require the court "to violate the clear mandate of Supreme Court precedent." 04-1704 Pet. App. 29a. The District Court was correct in its assessment of this Court's precedents.

This Court in numerous cases has recognized that the negative Commerce Clause permits States to take steps to encourage local industry and investment and create jobs, including through the structure of their tax laws. In *Boston Stock Exchange*, *supra*, this Court in a unanimous opinion con-

firmed that States may "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry," and may "compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." 429 U.S. at 336, 336-337. *Accord Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 385-386 (1991); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 645-646 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 406 n.12 (1984). In *Bacchus Imports*, *supra*, this Court stated that "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." 468 U.S. at 271. And in *Trinova Corp.*, *supra*, in rejecting a Commerce Clause challenge to Michigan's single business tax, this Court stated that "[i]t is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." 498 U.S. at 385. *See also Armco Inc.*, 467 U.S. at 645 (Commerce Clause permits "fair encouragement of in-state business").[10]

This Court has also indicated that a State, without violating the negative Commerce Clause, may use low taxes and tax exemptions to draw industry to the State. In *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), the Court noted that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or *low taxes*." *Id.* at 199 n.15 (emphasis added). And in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), the Court stated that "[t]he States are, of course, free to provide generally applicable nondiscriminatory tax exemptions without running afoul of the dormant Commerce Clause." *Id.* at 588 n.19.

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[10] The Sixth Circuit itself acknowledged in this case that there was no dispute that "it is legitimate for Ohio to structure its tax system to encourage new intrastate economic activity." 04-1704 Pet. App. 4a.

Members of the Court have also commented on the constitutionality of tax credits and tax breaks specifically. In *Alexandria Scrap Corp., supra*, Justice Stevens expressed the view that the negative Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry," and that such methods may include "a cash subsidy, *a tax credit*, or a special privilege intended to attract investment capital." 426 U.S. at 816 (concurring opinion) (emphasis added). Chief Justice Rehnquist similarly observed in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992), that "[t]here seems to be nothing * * * that would prevent [a State] from providing subsidies *or other tax breaks* to domestic industries * * *." *Id.* at 351 (dissenting opinion) (emphasis added).

As the foregoing observations suggest, there is no difference in economic terms between a tax credit and a subsidy—a point that respondents themselves have made. *See* Complaint ¶ 39 ("By means of § 5733.33, the State of Ohio has provided DaimlerChrysler with a subsidy of many millions of dollars * * *."); *see also New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 277 (1988) (noting that "the tax credit scheme has the purpose and effect of subsidizing a particular industry"); *Westinghouse Elec. Corp.*, 466 U.S. at 406 n.12 (discussing similarity of an investment tax credit to an indirect subsidy).

This Court has indicated that subsidies generally do not violate the negative Commerce Clause. In *New Energy Company, supra*, this Court in a unanimous opinion stated:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does. [486 U.S. at 278 (emphasis omitted).]

Similarly, in *West Lynn Creamery, supra*, the Court declared that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." 512 U.S. at 199. *See also id.* at 211 (Scalia, J., concurring in the judgment); *Alexandria Scrap Corp.*, 426 U.S. at 815-816 (Stevens, J., concurring).

Because the State of Ohio could have directly subsidized DaimlerChrysler without violating the negative Commerce Clause, and because the Ohio ITC is in substance no different than a subsidy, the Court should uphold the ITC against respondents' challenge. To do otherwise would be to elevate form over substance. *See City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 461 (1958) ("[E]mpty formalisms are too shadowy a basis for invalidating state tax laws.").[11]

In *New York* v. *Roberts*, 171 U.S. 658 (1898), this Court rejected a Commerce Clause claim very similar to the one that respondents assert here. In *Roberts*, this Court considered a New York statute imposing a franchise tax on all corporations doing business in New York but exempting companies wholly engaged in manufacturing within the State. This Court upheld the constitutionality of the statute against an attack brought by a Michigan corporation ineligible for the exemption. Reviewing the statute for conformity with, *inter alia*, "the freedom of interstate commerce," *id.* at 664, this Court's decision turned on the fact that the statute did not "distinguish between New York corporations and those of other states to the detriment of the latter, or * * * subject property out of the state to taxation." *Id.* at 663. With respect to the exemption for companies wholly engaged in manufacturing within New York, this Court acknowledged that "the tendency of the legislation" may be to "encourage

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[11] *Camps Newfound/Owatonna* does not compel a contrary conclusion. Although the Town of Harrison in that case sought to defend a property tax exemption as economically no different than a subsidy, *see* 520 U.S. at 589-591, the exemption was "facially discriminatory," *id.* at 582 n.16. In contrast, the Ohio ITC does not discriminate against interstate commerce, on its face or in any other respect.

manufacturing corporations which seek to do business in that state to bring their plants into New York," but the Court explained that "so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the federal courts." *Id.* at 665-666. Like the New York tax statute upheld in *Roberts*, the Ohio ITC exempts in-state investment from a generally applicable tax on corporations. And like the statute in *Roberts*, the ITC is not limited to Ohio corporations but is available to any corporation that invests in Ohio. Thus, *Roberts* would appear to control this case.

The constitutionality of the Ohio ITC is also supported by *Allied Stores of Ohio, supra*, in which this Court upheld against an equal protection challenge an Ohio law exempting out-of-state corporations from an *ad valorem* property tax paid by Ohio corporations. This Court explained that "it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within a State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." 358 U.S. at 528. It would be strange indeed if the Constitution allowed a State to give a tax exemption to out-of-state corporations while denying exemption to in-state corporations but did not allow a State to make a tax exemption, like the Ohio ITC, available to both in-state and out-of-state corporations.

### C. The Ohio Investment Tax Credit Is Fully Consistent With—If It Even Implicates—The Negative Commerce Clause.

Assuming that this Court's prior cases upholding and discussing tax exemptions, tax credits, subsidies, and other means of encouraging domestic industry do not foreclose respondents' negative Commerce Clause challenge, that challenge must still fail. Indeed, it is far from clear that the Ohio ITC is even "the kind of action with which the Commerce Clause is concerned." *Alexandria Scrap Corp.*, 426 U.S. at 805.

Last Term, in *American Trucking Associations, Inc.* v. *Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), this Court held that a Michigan statute imposing a $100 annual tax on trucks engaged in intrastate commercial hauling did not violate the Commerce Clause. In the key passage in the Court's opinion, the Court explained that

> we find nothing in [the Michigan statute] that offends the Commerce Clause. To begin with, Michigan imposes the flat $100 fee only upon intrastate transactions—that is, upon activates taking place exclusively within the State's borders. [The statute] does not facially discriminate against interstate or out-of-state activities or enterprises. The statute applies evenhandedly to all carriers that make domestic journeys. It does not reflect an effort to tax activity that takes place, in whole or in part, outside the State. Nothing in our case law suggests that such a neutral, locally-focused fee or tax is inconsistent with the dormant Commerce Clause. [*Id.* at 2423.]

So too here, Ohio's ITC applies only to "intrastate transactions"—"activities taking place exclusively within the State's borders." The ITC also "applies evenhandedly" as it "does not facially discriminate against interstate or out-of-state activities or enterprises." And it does not "tax activity that takes place, in whole or in part, outside the State." Under *American Trucking*, the Ohio ITC is "neutral, locally-focused" tax provision fully consistent with the negative Commerce Clause. *See also City of Chicago* v. *Willett Co.*, 344 U.S. 574, 577 (1953) (referring to "a State's undoubted power over its own internal commerce"); *Salt Co.*, 80 U.S. at 378 (characterizing a state law exempting from tax an in-state industry that the state sought to promote as a law "regulative of the internal economy of the State").

### D. Federalism Principles Support Ohio's Investment Tax Credit.

Any claim that a state statute violates the negative Commerce Clause should be judged with an eye toward principles of federalism. Thus, in assessing respondent's challenge to

the Ohio ITC, it is appropriate, even necessary, to consider how the ITC implicates such principles.[12]

In *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), in upholding a South Dakota resident-preference policy against a Commerce Clause challenge, this Court explained that its decision was supported by a "healthy regard for federalism and good government" and permitted state experimentation to take place. *Id.* at 441 (citing *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *See also Alexandria Scrap Corp.*, 426 U.S. at 817 (Stevens, J., concurring) (stating that the Commerce Clause does not "provide the basis for questioning a State's right to experiment with different incentives to business").

It is especially important to consider federalism principles in this case because a state taxation statute is at issue, and "the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests." *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 159 (1930). *See also Department of Revenue of Ore.*, 510 U.S. at 345 ("[T]he taxation authority of state government [is] an authority we have recognized as central to state sovereignty."); *Madden* v. *Kentucky*, 309 U.S. at 93. As in *Reeves*, "[r]estraint in this area is also counseled by considerations of state sovereignty, the role of each State as guardian and trustee for its people." 447 U.S. at 438 (footnote and internal quotation marks omitted).

One of the chief purposes and advantages of our federalism is that it fosters competition between the States. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"). Because individuals and corporations are free to move from one State to another,

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[12] As Justice Brennan once observed, "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action." *Allied Stores of Ohio, Inc.*, 358 U.S. at 532 (concurring opinion).

federalism leads States to vie with each other to offer a combination of laws, taxes, and services that will attract those outside of the State to come to it and those in the State to remain there. Of course, competition between States is also at heart of the Commerce Clause. *See Bacchus Imports, Ltd.*, 468 U.S. at 272 (noting that "competition among the States for a share of interstate commerce is a central element of our free-trade policy"); *Boston Stock Exch.*, 429 U.S. at 336-337 (emphasizing that a State may "compete with other States for a share of interstate commerce").

The Ohio ITC encourages both in-state and out-of-state businesses to invest in Ohio rather than other States. Thus, Ohio's enactment of the ITC is a laudable example of the interstate competition that the Constitution both permits and encourages. As Justice Brennan commented in *Zobel* v. *Williams*, 457 U.S. 55 (1982):

> a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation. [*Id.* at 67-68 (concurring opinion).]

Although Justice Brennan's comments about States attracting citizens with lower taxes were directed toward individual citizens, what he said also holds true with respect to corporate citizens. Recognizing Ohio's authority to use tax breaks to entice businesses to come to or remain in the State is essential to "the very idea of maintaining the States as independent sovereigns." *Id.*

Permitting States to compete for investment through the provision of tax credits is crucial to the economic welfare,

not only of particular States, but of the Nation as a whole. This case illustrates that why that is so. The automobile industry is global, and in the contest to attract automobile manufacturers to base their operations locally, the States compete, not only with each other, but with foreign countries as well. If States cannot use tax credits as an inducement to industry, a company thinking about building a new plant or expanding an existing one in the United States might choose to look overseas instead in search of more attractive options.

The Court has often repeated Justice Cardozo's words that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). In the area of investment tax credits, permitting States to compete—with each other and with foreign nations—makes the several States, our one Nation, and all Americans better off.

## III. NISSAN'S OWN INVESTMENT EXPERIENCE IN TENNESSEE ILLUSTRATES THE IMPORTANCE OF STATE TAX INCENTIVES TO STATE ECONOMIES AND TO THE ABILITY OF STATES TO COMPETE FOR INVESTMENT.

For nearly half a century, the State of Tennessee has sought to encourage the location in Tennessee of plants and equipment by high wage industries by providing a variety of tax incentives for such investment. *See McConnell* v. *City of Lebanon*, 314 S.W.2d 12, 20 (Tenn. 1958) (noting that "the matter of inducing industry to locate in this State has become a matter of great public concern" and that "[t]he modern tendency is to meet that challenge by appropriate legislation"). A centerpiece of these efforts was the State's successful negotiation in 1980 with Nissan that led Nissan to locate in Smyrna, Tennessee, Nissan's first automobile manufacturing plant in the United States. The Smyrna plant is one of the largest automotive production plants under one roof in the United States. Nisson subsequently constructed a sepa-

rate plant in Decherd, Tennessee. Since 1980, Nissan has invested $2.8 billion in plants and equipment in Tennessee and created some 12,000 jobs at these plants. *See Nissan Plans to Expand Pathfinder Production Facility in Tennessee*, Newport Plain Talk (June 26, 2003) (investment in Tennessee); *Nissan to Expand Decherd Powertrain Plant*, Bus. Wire (July 16, 2004) (number of jobs).

The effect of these industrial recruitment efforts has transformed Tennessee's economy. In each of the last nine years, manufacturers in Tennessee have invested between $2 billion and $4.4 billion in plants and equipment. *See* Tom Sharp, *Federal Case on Tax Breaks Could Affect Tennessee*, The Tennessean (Sept. 13, 2004). Nissan's Smyrna plant, along with others, has spawned the location of more than 950 parts manufacturing plants and supplier facilities in and around Middle Tennessee, collectively estimated to employ more than "154,000 Tennesseans representing 33% of the state's manufacturing workforce and 5.7% of total state employment." *Nissan Announces 1,500 Jobs Coming to Smyrna*, Lewisburg Trib. (June 26, 2004). This job multiplier effect makes the automotive industry, in particular, a highly sought-after boon for state economies. Each manufacturing job at a major automotive facility like that operated by Nissan at Smyrna spins off an additional 9.4 jobs. Institute of Labor and Industrial Relations at the University of Michigan, *et al.*, *Contribution of the U.S. Motor Vehicle Industry to the Economies of the United States, California, New York, and New Jersey in 2003* (May 2004) (available at http:/www.cargroup.org/pdfs/ContributionStudy.pdf).

Tennessee, a comparatively low wage state,[13] has benefited immensely from the high paying jobs created by Nissan's multi-billion investment in its Tennessee plants. Assembly line jobs at Nissan's Smyrna and Decherd facilitates provide

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[13] Tennessee ranked thirtieth among the 50 States and District of Columbia for average annual pay in 2001. *See* Bureau of Labor Statistics, State Average Annual Pay for 2000 and 2001 (available at www.bls.gov/news.release/annpay.t02.htm).

an average annual wage in excess of $57,000—more than $25,000 above the state average. *See Nissan Expansion Good News for Regional Economy*, Daily News J. (July 21, 2000) (citing Tennessee Commissioner of Economic and Community Development); Bureau of Labor Statistics, *supra*. All told, Tennessee's automotive manufacturers provide jobs, with a Tennessee's payroll in excess of $5.7 billion, which represent the first opportunity for thousands of Tennessee families to move solidly into the middle class.

The tax incentives that States such as Ohio and Tennessee offer are critical to competition for investment among the various States, but also are increasingly important in competing with other countries for investment in the global marketplace. Nissan's experience illustrates that in a global economy, particularly since the ratification of NAFTA, States within the United States compete for manufacturing jobs not only among themselves, but also with foreign countries.[14]

In 2001, for example, when Nissan decided to expand its engine plant in Decherd, Tennessee, as part of an overall Tennessee investment of more than $1 billion, Nissan added approximately 1,000 additional high paying Tennessee jobs. *See* Bernard Bush, *Decherd to Get Nissan Metal Forge*, The Tennessean (July 17, 2004). In 2004, Nissan further expanded the Decherd facility to add a crankshaft production center. *See id.* In deciding where to place this operation, Nissan's business determination ultimately came down to a choice between expanding its Decherd facility or its factory in Aguascalientes, Mexico, where Nissan currently annually manufactures 250,000 Sentra automobiles, many of which are exported duty-free to the United States. The tax incentives offered to Nissan by Tennessee played a significant role in offsetting the very substantial wage differential between Tennessee and Mexico and thus were an important factor in

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[14] Tennessee was one of the 27 States that jointly filed a certiorari stage *amici* brief supporting petitioners in this Court. Tennessee, along with Kentucky and Michigan, also filed an *amici* brief in the Sixth Circuit urging *en banc* review.

Nissan's decision to invest in its Decherd plant for this project. In other major Tennessee investments in the past four years, Nissan has established new production lines and expanded facilities for manufacturing its Pathfinder and Maxima vehicles in Smyrna. The recent Pathfinder and Maxima operations, together with the recent Decherd engine plant expansion and crankshaft production line, added more than 2,000 Tennessee Nissan jobs—all transferred from existing facilities in Japan. *See* Wayne Thomas & Larry Nee, *Nissan Plans Forging Plant*, Herald Chron. (July 20, 2004); John Callow, *Nissan to Add 1,500 More Jobs*, Daily News J. (June 26, 2003).

In sum, Nissan's own investment experience in Tennessee shows the importance of state tax incentives to state economies and to the ability of States to compete for investment.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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In the

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## QUESTIONS PRESENTED

1. Do respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33?

2. The "Dormant Commerce Clause" forbids states from using their internal regulatory powers as barriers to exclude out-of-state businesses from competing against in-state businesses. Ohio's investment tax credit gives tax breaks and other incentives to out-of-state businesses to encourage them to enter and expand their business operations within Ohio. Does the tax credit violate the Dormant Commerce Clause?

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioners. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. As part of its litigation practice, PLF routinely litigates in defense of state and federal constitutional rights in federal district and appellate courts. PLF is therefore especially interested in the standing question presented in this case. PLF has participated in many cases in support of state autonomy within the Constitution's system of federalism, including *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) and *Franchise Tax Bd. of California v. Hyatt*, 537 U.S. 946 (2002). In addition, PLF's Free Enterprise Project defends the freedom of economic opportunity both through direct litigation and by participating as amicus curiae in state and federal courts. PLF has participated as amicus in cases such as *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 895 (2005); and *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002). Because of its history and expertise with regard to civil rights litigation, economic freedom, and federalism, PLF believes its perspective will aid this Court in considering this case.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than amicus curiae, made a monetary contribution specifically for the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

In addition to the issue brought to the Court by the parties, this Court requested briefing on the standing of plaintiffs to challenge state income tax credits. That question, however, is too narrow. Whether plaintiffs have standing to present this claim in federal court, the plaintiffs most assuredly had standing to bring this case in the Ohio state courts where the case was initially filed. This case is in the federal courts only because the defendants removed the action. That removal, however, is valid only if the district court had original jurisdiction over the action. A finding that plaintiffs do not have standing to pursue the particular argument now before the Court does not answer this question. Instead, the Court must examine the entire case to determine whether the federal courts had subject matter jurisdiction. If jurisdiction was lacking, the entire case must be remanded to the state courts.

On the merits of the claim, it is true that "the Commerce Clause of its own force protects free trade among the States." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). This is what the framers of the Clause intended, and Chief Justice Marshall was correct to hold in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), that Congress' authority to regulate interstate commerce "excludes, necessarily, the action of [States] that would perform the same operation on the same thing." In particular, the Clause forbids domestic economic interest groups from using the state's regulatory power to exclude competition from outsiders. However, the Commerce Clause also leaves the states with autonomy to regulate internal affairs, including authority to design their taxes and regulations in ways they believe will encourage interstate competition. In this case, the Ohio tax incentive encourages out-of-state businesses to enter and do business in Ohio. It is not exclusionary legislation, but an invitation that imposes no burden on interstate commerce.

The Court below held that a tax incentive program violates the Commerce Clause if it results in "diversion of interstate commerce from the most economically efficient channels." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 744 (6th Cir. 2004). But this Court has never held that "diversion" alone violates the Commerce Clause. It has always required some degree of burden on interstate commerce that creates a barrier to entry into the state. Since no burden is present here, the decision below should be reversed.

Nor should this Court adopt the "diversion" theory of the Dormant Commerce Clause. That theory would severely limit the autonomy of the states, which is protected under the Commerce Clause. State autonomy results in "competitive federalism" in which states compete with one another to provide the best regulatory regime for mobile citizens. Consequently, states have created widely different business environments: states like Oregon and Montana have no sales tax, for instance, and Nevada allows legal gambling. These variations cause significant "diversion" of interstate commerce. If the decision below is affirmed, states will be forbidden to institute such diverse tax and regulatory environments. This should not happen. Tax incentives improve interstate competition, benefit the citizenry, and pose no realistic danger to interstate comity. The decision below should be reversed.

## ARGUMENT

### I

### BEFORE CONSIDERING DISMISSAL, THIS COURT MUST FIRST DETERMINE WHETHER THE DISTRICT COURT HAD ORIGINAL JURISDICTION OVER THE CASE

The plaintiffs filed their case, claiming that the statutes at issue violated the Ohio State Constitution as well as the United States Constitution, in Ohio state court. Based on the presence

of a federal issue, DaimlerChrysler (with the state's consent) removed the action to federal court. In conjunction with the plaintiffs' motion for remand, DaimlerChrysler and the state argued that plaintiffs had standing to bring the case in the federal courts.[2]

Amicus will leave the arguments on plaintiffs' standing to the parties (and we expect the parties to argue that Kim's Auto does have standing because of the unique injury that it alleged).[3] Amicus does argue, however, that before a removed action can be dismissed for lack of standing, this Court must review the entire complaint to determine whether the action was within the original jurisdiction of the district court. If not, the case must be remanded back to the Ohio state courts.

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[2] Memorandum Opinion (Denying Motion to Remand) at 5-6 ("Plaintiffs have not been able to bring themselves to argue that they completely lack standing in federal court; on the other hand, the Defendants have not been overly eager to argue that Plaintiffs have adequate standing to appear in this Court . . . Of course, since the Defendants removed this action to federal court, the burden of proving jurisdiction, and therefore standing, is theirs"). The District Court ultimately ruled that Plaintiffs had "municipal taxpayer" standing under *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923), to challenge the property tax exemption. Memorandum Opinion at 6-7.

[3] Complaint for Declaratory and Injunctive Relief ¶¶ 41-42 (alleging that plaintiff Kim's Auto and Truck Services, Inc., suffered business injuries from the expansion of the jeep plant that would not have happened but for the state income tax credit.)

### A. State Courts Have Power to Decide Federal Constitutional Issues, and Are the Best Courts Suited to Deciding State Constitutional Questions

"It, of course, is clearly established that state supreme courts get the final word as to the interpretation of state law." Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. Pa. J. Const. L. 537, 555 (2003). It is equally clear that state courts also "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). When state courts address issues of federal law, they are not bound by the same Article III considerations that define the jurisdiction of the federal courts. *Id.*; *Int'l Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 n.4 (1991). A party without standing in federal court (and thus unable to invoke the court's jurisdiction) may well have standing to make the same arguments in state court. *See ASARCO*, 490 U.S. at 617 ("[w]e have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law"); *Int'l Primate Prot. League*, 500 U.S. at 78 n.4 (Article III requirements do not apply in state courts).

This difference in the jurisdiction of state and federal courts stems from the fact that state courts exercise a reserved judicial power, *Healy v. Ratta*, 292 U.S. 263, 270 (1934), and is firmly entrenched in our system of federalism, Briant S. Platt, *Section 1446(b) Federal Removal Jurisdiction and the Thirty-Day Clock: Should a Motion to Amend Trigger the Time Bomb?*, 4 Nev. L.J. 120, 130 (2003). Federalism does not just describe a system of disbursed power. Instead it "is commonly understood as a mechanism designed to institutionalize a

permanent struggle between state and national power" as a means of protecting individual liberty. James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 Wm. & Mary L. Rev. 1725, 1728 (2003). As such, "[f]ederalism thus is not a historical oddity best left to disappear, but rather the people's safety net." Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 323 (2003).

These considerations were at the forefront when this Court counseled caution in exercising removal jurisdiction: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Ratta*, 292 U.S. at 270. In the time since the decision in *Ratta*, the scope of removal jurisdiction has grown. Yet it is still true that removal jurisdiction does not lie unless the district court has original jurisdiction over at least one of the causes of action. 28 U.S.C. § 1441(a). This is important because when a case is removed to federal court, the entire case is removed. 28 U.S.C. § 1441(c). This results in the federal courts sitting as courts of last resort on issues of state statutory and constitutional law. Thus when this case involving both state and federal causes of action was removed to federal court, it was the federal court that ruled on the application of Ohio's state constitution to the claims at issue here. Had the case remained in the state court system, however, defendants would have retained access to the federal courts on the federal claims. *See ASARCO*, 490 U.S. at 619. Before dismissing any removed case, therefore, this Court should first assure itself that the case was within the original jurisdiction of the district court.

**B. Ohio Courts Had Jurisdiction to Hear This Case**

This Court has raised the question of whether the federal courts have subject matter jurisdiction over the one remaining claim in the case. There is no question, however, that the Ohio courts had jurisdiction over the case as originally filed. Like most states,[4] Ohio recognizes the standing of taxpayers to enforce public duties. Indeed, taxpayer standing is provided for by an Ohio statute. Ohio Rev. Code Ann. § 733.59. Ohio, however, goes further than many states in that it does not require any showing of injury to the public fisc in order to maintain an action as a taxpayer:

> [W]here the question is one of public right and the object of the mandamus is to procure the enforcement of public duty, the people are regarded as the real party and the relator need not show that he has any . . . special interest in the result, since it is sufficient that he is interested as a citizen or taxpayer in having the laws executed and the duty in question enforced.

*State ex rel. Nimon v. Vill. of Springdale*, 215 N.E.2d 592, 595 (Ohio 1966) (citation omitted). Thus, had this case not been removed to federal court, the Ohio courts had jurisdiction to consider the state and federal constitutional claims raised in plaintiffs' complaint.

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[4] The leading survey on this issue is *Taxpayers' Suits: A Survey and Summary*, 69 Yale L.J. 895 (1960). At the time of that article, 34 states recognized taxpayer standing to challenge state agency actions, and all of the states recognized taxpayer standing to challenge municipal actions. *Id.* at 895-96.

### C. If This Court Determines That Plaintiffs Lack Standing on This Case, the Court Should Examine Whether the District Court Had Jurisdiction over Other Causes of Action to Decide Whether to Remand or to Dismiss

The jurisdictional inquiry does not come to an end if this Court finds that the plaintiffs do not have standing on the state income tax claim. Instead, the Court must search the complaint in the case and determine if the federal courts ever had jurisdiction over *any part* of the case. *See* 28 U.S.C. § 1447. As noted by then Judge Breyer in writing for the First Circuit: "We think, however, that the district court erred in departing from the literal words of § 1447(c), which, on their face, give it no discretion to dismiss rather than remand an action. And, we are unwilling to read such discretion into the statute." *Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Services*, 876 F.2d 1051, 1054 (1st Cir. 1989). Although the statute imposes on the district court a duty to remand before judgment, that duty has been applied any time the federal courts discover they are without subject matter jurisdiction. *See, e.g., Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 496 (6th Cir. 1999).

This Court has also ruled that there is no room for discretion in the command of section 1447. *Int'l Primate Prot. League*, 500 U.S. at 89 (citing *Maine Ass'n of Interdependent Neighborhoods*, 876 F.2d at 1054-55). Thus, if the district court did not have subject matter jurisdiction, the jurisdictional defect is fatal as far as federal courts are concerned. *Cf. Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996). Because this Court has requested briefing on plaintiffs' standing on only a small part of the original action, the Court will not be in a position to determine whether the federal district court had subject matter jurisdiction.

*If the district court did not have jurisdiction, then a dismissal at this juncture will mean that a federal court without jurisdiction over the matter was the court of last resort on the meaning and application of the Ohio State Constitution.* This Court should not countenance such a significant intrusion into the jurisdiction of Ohio's state courts. Instead, if this Court finds that plaintiffs lack standing to challenge the state income tax incentives in federal court, the Court must also review whether plaintiffs had *federal* court standing to challenge the property tax exemption. If not, then the district court never had jurisdiction and the entire case should be remanded to the Ohio state court.

## II

## OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE COMMERCE CLAUSE

### A. The Commerce Clause Forbids Trade Barriers Between States, but the Ohio Tax Incentive Is Not a Trade Barrier

The Court of Appeals' primary error lies in its failure to focus on the underlying purpose of the Dormant Commerce Clause. The "Dormant Commerce Clause" is unfortunately named, because it is not really "dormant" at all; it is simply a logical consequence of the unambiguous supremacy of federal authority to regulate commerce among the several states. *See Gibbons*, 22 U.S. (9 Wheat.) at 206, 209-10.

The Commerce Clause was written to encourage free commerce between the several states by giving the federal government the supreme authority to "produce[] a uniform whole," *id.* at 209, by "control[ling] the State laws, so far as it may be necessary to control them, for the regulation of commerce." *Id.* at 206. Before the Constitution of 1787, states were engaged in various protectionist schemes to give their domestic producers unfair legal advantages against out-of-state

producers. Each state "pursued its own real or supposed local interests; each was jealous of the rivalry of its neighbors; and each was successively driven to retaliatory measures." Joseph Story, *A Familiar Exposition of the Constitution of the United States* 140 (Regnery Gateway, Inc., 1986) (1859). The "distinctions, preferences, and exclusions" that states engaged in—such as taxing each others' exports, levying different taxes on goods that traveled from states without ports into states with ports, and so forth—led to "unceasing animosit[y]." *The Federalist* No. 7, at 116 (Alexander Hamilton); No. 42, at 305 (James Madison) (Benjamin Fletcher Wright ed., Barnes & Noble, Inc. 1996). The Constitution therefore gave Congress "a superintending authority over the reciprocal trade of confederated States," so as to stop wasteful and politically dangerous trade wars. *Id.* at 306. As Justice Jackson explained in his particularly eloquent opinion, *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 538-39 (1949),

> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce . . . . We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!

The Commerce Clause, Jackson continued, ensures "that every farmer and every craftsman . . . will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them." *Id.* at 539. Thus the Clause allows the merchants in one state to do business in another by ensuring that states do not give in to the pressures of domestic lobbyists to keep out competition.

The tax credit here *does not exclude* out-of-state merchants. It is not a "reprisal" or a "dislocation" or a "home embargo." *Id.* at 539. On the contrary, it *serves* the goals of the Dormant Commerce Clause by further knitting the interstate market together. It is not a barrier to keep out competition; it *encourages* competition by inviting out-of-state businesses to enter and participate in the local economy. This is the opposite of the "Balkanization" that was the ultimate evil the Commerce Clause's authors sought to avoid. And it has beneficial effects on the consumer, in that it drives down prices, and increases the availability of goods and services on the market. When a law is not "motivated by preference for local interests as such over foreign interests," it should not be held to violate the Commerce Clause. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1253 (1986).

In addition, "there must be a negative impact on interstate commerce before an unconstitutional burden on interstate commerce will be found." Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 930 (1986). This Court's words in *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997), are equally appropriate here: "eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors."

This Court has never held that states are barred from "structuring their tax systems to encourage the growth and development of intrastate commerce and industry" or "compet[ing] with other States for a share of interstate commerce." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336-37 (1977). In fact, the Court repeatedly has stated that "States may try to attract business by creating an environment

conducive to economic activity." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994). *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry").

### B. The "Diversionary Effects" of State Tax Policy Are Not Sufficient to Violate the Commerce Clause

Tax incentives that a state gives to out-of-state businesses to encourage them to do business within the state may well have "diversionary" effects on the national economy—meaning that they will lead a business to locate in one state over another. But the theory that these effects alone violate the Commerce Clause appears to have originated in a deeply flawed law review article published ten years ago. *See* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377 (1996). Enrich began with the erroneous assertion that tax incentives are bad for society—an assertion he supported by claiming that such incentives "incur a very substantial loss of tax revenues," *id.* at 398. But the Constitution does not forbid a state from choosing to forego potential tax revenues. Tax revenues do not exist in a state of nature—they are imposed by a legislature which decides to tax. If the legislature chooses not to tax, or chooses to tax less than it might otherwise do, it has hardly violated any duty it owes to citizens or American society. *Cf. Chrysler Rail Transp. Corp. v. Holt*, 845 F. Supp. 463, 468 (D. Mich. 1994) ("[t]he State has chosen not to spend the time and money to actively seek out ownership information . . . but instead has applied the tax if and when relevant ownership information becomes available . . . . While this method of enforcing the tax codes may be inefficient, it is not illegal").

Enrich's understanding of the economics of tax incentives contains additional flaws. First, his contention that tax

incentives cause states to compete "for a finite pool of businesses and jobs" reflects a profound misunderstanding of the nature of the free market. Enrich, *supra*, at 401. The economy is not a zero-sum game featuring a "finite pool" of businesses and jobs: on the contrary, a free market creates *new* jobs and new businesses through the process of competition and expansion. *See* George Reisman, *Capitalism: A Treatise on Economics* 343 (1996) ("competition . . . in a division-of-labor, capitalist society . . . . [is] not . . . [for] the seizure of a fixed supply of [goods] provided by nature . . . . [but] in the positive creation of [new products]").

Even more astonishingly, Enrich complains that tax incentives are implemented by "decisionmakers [who] are accountable to voters"! Enrich, *supra*, at 402. He contends that economic policies should be set instead by "rational" decision makers who are *not* subject to "a wide range of political considerations." *Id.* at 402. But the Constitution *fosters* a system whereby a state's economic decisions are made on the basis of a wide range of political considerations by people who are accountable to voters. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (legislatures are " 'far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions" (citations omitted)). And the Commerce Clause *encourages* a national system of exchange and competition, including competition by states seeking to offer the most attractive business environment to companies that can choose where to do business. *See, e.g., New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988) ("[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.* Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does").

Further, although Enrich claims that interstate competition for the attention of businesses "engender[s] intense and often hostile rivalries between the states," he provides no serious support for this claim. Enrich, *supra*, at 400. His only examples of such "hostility" are the "martial metaphors" used by state politicians when discussing competition: politicians and lawyers used terms like "first-strike attack" and "second war between the states" when discussing the fact that legislatures try to make their states more attractive to business. *Id.* at 400-01 (citation omitted). But rhetorical flourishes hardly rise to the level of outright conflict that occurred in the United States under the Articles of Confederation and gave rise to the Commerce Clause. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1, 23-24 (1999) (describing how states enacted "debtor relief laws, which enabled borrowers to avoid their contractual obligations and authorized the emission of worthless paper money" as well as "protectionist trade laws, taxes, and port fees" that led to "[b]order quarrels . . . and regional economic tensions"). In fact, there is no reason to believe that tax incentives are a threat to peace between the states, or that they harm citizens.

### C. Without Protectionist Intent or Burdens on Interstate Competition, a Tax Incentive Does Not Violate the Commerce Clause

The theory that "diversion" of the market itself violates the Dormant Commerce Clause finds no support in either the Clause's history or the cases interpreting it. The Commerce Clause only prohibits states from "plac[ing] *burdens* on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (emphasis added). Thus "a tax impermissibly discriminates in violation of the Clause if it expresses the taxing authority's 'preference for

domestic commerce over foreign commerce,' by *disadvantaging foreign corporations or goods*, or by *restricting* the free flow of goods between states." *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522, 1539 (3d Cir. 1993) (emphasis added; citations omitted). As a result, this Court has always insisted on some evidence of a protectionist goal in a law—some legislative design to prevent competition within a state by out-of-state interests—before finding that it violates the Commerce Clause. In *Bacchus Imports*, 468 U.S. at 271, for example, the Court found a Hawaii law which taxed imported wine but not locally produced wine to be an unconstitutional protectionist measure because it "'discriminat[ed] in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other states or countries'" (quoting *Welton v. Missouri*, 91 U.S. 275, 277 (1875)). In *Boston Stock Exch., supra*, the Court held that New York could not tax out-of-state stock transactions more heavily than in-state transactions, because doing so was the sort of "favor [to] local enterprises at the expense of out-of-state businesses" which the Commerce Clause abhors. 429 U.S. at 329.

In addition to the presence of a protectionist intent, the Court has always required the showing of some sort of burden on out-of-state producers. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669-70 (2003). In the absence of an actual burden on out-of-state producers, even a law which gives benefits to in-state producers has not been held to violate the Clause. *Id.* In *Walsh*, the Court held that a Maine law permitting reimbursement of local pharmacies for drugs dispensed to the indigent did not violate the Commerce Clause. It distinguished three cases—*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), *Healy v. Beer Inst.*, 491 U.S. 324 (1989), and *West Lynn Creamery*, 512 U.S. at 186—on the grounds that each of those cases involved actual burdens on out-of-state businesses. In *Baldwin* and *Beer Inst.*, the challenged laws

prohibited out-of-state producers from selling in the state unless they conformed to officially set minimum prices; in *West Lynn Creamery*, the out-of-state producers were taxed to support a subsidy paid to the in-state producers.

Unlike those cases, however, out-of-state businesses experience no burden under Ohio's tax incentive program. They are simply obtaining or foregoing a benefit which is entirely within Ohio's discretion to grant or to deny. "[A] state tax incentive that focuses exclusively on a taxpayer's in-state activities does not have the sort of negative impact on interstate commerce with which the commerce clause is concerned." Tatarowicz & Mims-Velarde, *supra*, at 928-29.

A finding that market "diversion" *alone* violates the Commerce Clause—without any showing of a legislative plan to bar competition or to burden out-of-state businesses—has never been endorsed by the Court. Even in *Bacchus Imports,* the Court explicitly refused to ignore the legislative intent to favor domestic industry over foreign industry. 468 U.S. at 274. *See also Dominion Nat'l Bank v. Olsen*, 771 F.2d 108, 117 (6th Cir. 1985) ("a tax is found to be discriminatory . . . *where the underlying purpose of the tax is simple economic protectionism* as opposed to some other arguably legitimate state purpose") (emphasis added). Here, however, there is no intent to benefit local industry at the expense of out-of-state industry. On the contrary, the tax benefit is offered principally to out-of-state businesses, to encourage them to participate in the local economy.

Also, the *Bacchus Imports* decision did not find—contrary to the opinion below—that the difference between a benefit to in-state businesses and a burden to out-of-state businesses was irrelevant. Rather, *Bacchus Imports* holds that *once a law is found to treat businesses unequally on the basis of their location*, the distinction between benefits and burdens does not apply. 468 U.S. at 273. The Hawaii tax exemption was not

available to out-of-state wine producers doing business in Hawaii, meaning that the benefit to in-state producers was *exclusive*, and therefore an inherent burden on interstate commerce. But here, the benefit is available to out-of-state businesses. The tax credit here does not create a trade barrier, does not exclude competition, does not erect "a financial barrier around the State," *Am. Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987), and does not create any serious controversies between states. The Commerce Clause was intended to create a free-trade zone within the United States, and that purpose is advanced only by allowing states to cut taxes in an effort to increase the state's economic competitiveness. In the absence of some burden on out-of-state businesses, a tax incentive plan simply cannot be held to violate the Commerce Clause. *See* Tatarowicz & Mims-Velarde, *supra*, at 928-29. The Clause provides no warrant for prohibiting Ohio from basing its tax policy on its view of what will encourage businesses to locate there.

## III

## THE DECISION BELOW THREATENS IMPORTANT FEDERALISM PRINCIPLES

### A. The "Diversion" Theory Would Require All State Tax and Regulatory Policies to Be Uniform

The framers of the Constitution did not intend for the Clause to interfere with the "independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except in duties on imports and exports." *The Federalist* No. 33, *supra* at 248 (Alexander Hamilton). To hold, as the decision below does, that a law usurps federal authority over interstate commerce whenever it "[diverts] interstate commerce from the most economically efficient channels," *Cuno*, 386 F.3d at 744—even though such a law actually *encourages* out-of-state producers to do business

there—would seriously harm the independent regulatory authority of states.

Under the Court of Appeals' "diversion" test, anything short of a completely uniform national flat tax and a complete abolition of state regulatory discretion, would be unconstitutional, because anything other than a uniform policy will divert interstate commerce from its most economically efficient channels. The Constitution allows states wide discretion to choose how to regulate and tax businesses, and that includes (within the boundaries of the Fourteenth Amendment) the discretion to base those choices on what they believe will protect the public health and safety, and what they believe will encourage the development of local economies.

One of the primary virtues of federalism is that it allows regulatory decisions to be made at the level closest to those who are regulated. It makes sense that decisions with regard to the taxation and regulation of the business of a state should be made by those who are most affected by such decisions, rather than by people in a far-distant national capital. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("decentralized government that will be more sensitive to the diverse needs of a heterogenous society"). Thus, as Madison explained, the Constitution delegates to the federal government power over "external objects, as war, peace, negotiation," while leaving to the states the authority over those things "which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, *improvement, and prosperity* of the State." *The Federalist* No. 45, *supra* at 328 (James Madison) (emphasis added). Requiring people in vastly different states to adhere to a uniform tax and regulatory policy so as to avoid "diverting interstate commerce from the most economically efficient channels" would handicap the independent authority of states in this regard. The Constitution does not "abrogat[e] or prevent[] the collection of a tax laid by the authority of the State (unless upon imports and

exports)...." *The Federalist* No. 33, *supra* at 247 (Alexander Hamilton).

The "diversion" theory on which the court below relied would impose a uniformity on state economic policies, however—a uniformity which would conflict with this principle of home rule. Indeed, Enrich, *supra*, argued that courts should adopt this theory as a means of "saving the states from themselves," *id.* at 377—hardly the role of a Court which recognizes "that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause," *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Enrich acknowledged that his theory would impose "unprecedented" limits on the "state independence" which this Court has repeatedly described as one of the most basic elements of our constitutional structure. *See* Enrich, *supra* at 466. His answer to this problem, however, was to propose that states find other ways of encouraging economic growth. This is not convincing. "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *United States v. Lopez*, 514 U.S. 549, 572 (1995) (Kennedy and O'Connor, JJ; concurring).

### B. The Decision Below Would Interfere with "Competitive Federalism"

Complimenting this concept of state autonomy is the concept of "competitive federalism." *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1498-1500 (1987) (people base choices on where to live in part on legal and social environment). The federalist system allows states, in some ways, to act as "laboratories" for the development of legislation. *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (citing *New State Ice*

*Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). This means that, by devising different regulatory and tax schemes, states participate in a kind of "market" in which a person can choose where he or she would prefer to locate his or her business or home. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956). This understanding of federalism is often called "competitive federalism," and it "put[s] the States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458. This state competition, though, *necessarily depends* on "diverting" the market—in that people must be free to choose to partake of the laws of one state over those of another.

Competitive federalism would be drastically curtailed if the decision below were to stand. States would be prevented from devising regulatory or tax schemes which might draw merchants to locate there instead of in other states. If Nevada, for example, can choose to legalize gambling, businesses such as casinos and resorts will choose to locate there instead of Utah or California. But that does not mean that Nevada's decision to allow gambling violates the Commerce Clause. *Cf. Valley Broad. Co. v. United States*, 820 F. Supp. 519, 526 (D. Nev. 1993) ("the primary federal interest relating to the social costs of gambling is limited to the protecting individual state choice on this issue").

Delaware, Montana, New Hampshire, Oregon, and Alaska have no sales tax, and as a result, people sometimes travel across state lines to buy things in those states. *See* Wyatt Buchanan, *Californians Duck Sales Tax by Shopping Across Border in Oregon*, S.F. Chron., Jan. 14, 2003, at A1, *available at* 2003 WLNR 8243261. But that does not mean that California, New York, or other states have the right to compel them to institute sales taxes so as to prevent this "diversion" of the market away from its "efficient channels." Likewise, people running corporations overwhelmingly prefer to incorporate in Delaware, to take advantage of that state's

favorable business climate and reputation for expertise in corporate law. Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects*, 31 Hofstra L. Rev. 681, 682 (2003). The ability of businesses to choose where to incorporate has had important effects on the business community, and, as McDonnell explains, imposing a national uniform corporations law, and thus eliminating competition between the states, "would make the federal government less responsive than Delaware to changes in the business environment." *Id.* at 737. But, again, under the theory adopted by the court below, Delaware's more attractive corporate law structure would violate the Dormant Commerce Clause because it "diverts" companies into incorporating there instead of elsewhere. The decision below does serious damage to one of the primary virtues of the federalist system, which is the ability of states to compete for the approval of citizens.

Enrich, whose law review article gave birth to the "diversion" theory, contended that competitive federalism "is costly and unproductive," Enrich, *supra* at 380, because it causes states to forego tax revenues that they might have obtained if there were no such competition. No doubt this is true to a degree, but it hardly justifies imposing a monolithic tax structure on all of the states. Enrich acknowledges that his novel non-"diversion" theory of the Commerce Clause would intrude on state autonomy. *Id.* at 466. But competitive federalism, he contends, should be limited so as to allow states to "derive [more] tax revenues from major portions of the business community"—*i.e.*, to impose a monolithic tax structure on businesses throughout the country. *Id.* at 467.

There are three basic problems with this approach, however. First, the Court is bound to apply the Constitution, even where some people would prefer alternative arrangements. Competitive federalism is the law of the land, and should be applied even where courts or lawyers might prefer some other

system. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). Second, competitive federalism does not harm state tax revenues, because the economy is not a zero-sum game. By encouraging investment and economic growth, tax incentives allow businesses to grow to a level that ultimately increases the tax revenue a state can exact. Third, limiting a state's autonomy so as not to exert competitive pressure on other states could threaten state autonomy in noneconomic matters as well, including morals legislation, laws regarding homosexual marriage, or other contentious matters. After all, homosexual couples might be more likely to choose to reside in—and do business in—states that allow such marriages than states that do not. Under Enrich's theory, this "tilt[s] the . . . playing field" unfairly by pressuring noncomplying states to legalize such marriages. *Cf.*, Enrich, *supra* at 467. Thus Enrich's theory "would elevate [one state's] sovereignty interests above those of [another]" by forbidding states from creating more business-friendly or socially innovative legal environments than any other state. *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 498 (2003).

In short, while Enrich purports to be concerned about a "race to the bottom" among states competing for the attention of business, Enrich, *supra* at 380, his proposal actually would create a "weakest link" effect under which states would be free to raise, but not to lower taxes; to increase, but not to decrease, their regulatory burdens. A state would be forbidden to innovate to any degree which might draw businesses or citizens to that state instead of neighboring states. Adopting the Respondents' argument in this case would mean the end of the "laboratory" theory of competitive federalism.

## CONCLUSION

This Court has often declared that States may "compete with other States for a share of interstate commerce," *Boston Stock Exch.*, 429 U.S. at 336-37, may "try to attract business by creating an environment conducive to economic activity," *West Lynn Creamery*, 512 U.S. at 199, n.15, and may "enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports*, 468 U.S. at 271. If States do have this freedom, the inevitable consequence will be a national marketplace in which states compete for the opportunity to host businesses. Such competition has long been regarded as one of the great benefits of federalism. *Gregory*, 501 U.S. at 458. The decision below—that a tax incentive program violates the Commerce Clause whenever it "diverts" a business in this way—would require uniform tax and regulatory structures in all of the States, and would do serious harm to state autonomy. The principles of federalism preclude this. The judgment of the Sixth Circuit Court of Appeals should be *reversed.*

DATED: November, 2005.

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In The

# Supreme Court of the United States

DAIMLERCHRYSLER, INC., et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF THE RIGHT PLACE, INC., AND THE CITY OF GRAND RAPIDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

The *amici curiae* will address the following questions:

1. Whether Ohio's investment tax credit, which is equally available to both Ohio residents and non-residents, violates the "non-discrimination" test this Court has articulated for analyzing whether a state tax program violates the dormant Commerce Clause.

2. Whether the "non-discrimination" test should be clarified as prohibiting only those state laws that both (1) discriminate between resident and foreign goods or businesses *and* (2) harm the national economy.

3. Whether this Court should abandon the dormant Commerce Clause doctrine in the context of state tax programs.

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## BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICI CURIAE*[1]

The Right Place, Inc. (The Right Place), is a regional, non-profit economic development organization. Its mission is to promote area economic growth through high-quality employment, productivity, and technology. The program focuses on retaining existing jobs, supporting local business growth, and attracting new businesses to the greater Grand Rapids, Michigan area.

The City of Grand Rapids (Grand Rapids) is the second largest city in Michigan, with a metropolitan regional population of approximately 1,000,000. Grand Rapids has grown by 4% in the last decade – the only major urban Michigan community to do so. This economic development is the result, at least in part, of business tax incentives and other programs that encourage business retention, expansion, and relocation in the region.

The issue of what test courts will apply when evaluating the constitutionality of investment tax credits is of great importance to The Right Place and Grand Rapids. The Right Place and Grand Rapids urge this Court to clarify that the "non-discrimination" standard, used for determining whether a state tax system violates the dormant Commerce Clause, does not bar States from competing with one another for business, an activity that advances the Commerce Clause's objective of achieving an

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[1] Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part. In addition to *amici curiae*, their members, and their counsel, Alticor Inc. has made a monetary contribution to the preparation and submission of this brief.

efficient, national economy. Alternatively, The Right Place and Grand Rapids urge this Court to abandon the dormant Commerce Clause doctrine in the context of state tax programs, because the doctrine has no basis in the Constitution and has proved virtually unworkable in application, as various Justices of this Court have frequently observed. Under either of these scenarios, Ohio's investment tax credit will be preserved.

## STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. In 1998, the City of Toledo and two local school districts provided a $281 million incentive package to DaimlerChrysler to encourage maintenance of long-standing Jeep production in Toledo rather than construction of new facilities in Michigan. DaimlerChrysler accepted the incentives and opened a new Toledo plant in 2001 that employs approximately 3,800 workers. Sarah A. Webster, *Ohio Tax Credit Struck Down*, Det. Free Press, Sept. 3, 2004, 2d Edition.

2. The incentive package had two components. The first, a ten-year 100% personal property tax exemption, Ohio Rev. Code Ann. § 5709, is worth approximately $210 million. The second, an investment tax credit of 13.5% against the state corporate franchise tax for certain qualifying investments, Ohio Rev. Code Ann. § 5733.33, is worth approximately $71 million. *Id.*

3. All 50 states use some form of business incentive to promote economic development. According to the National Association of State Development Agencies, there are 1,105 different business incentives offered by the 50 states, 40% (or 445) of which are tax-based. *See* Committee to Study State and Local Taxes (created in accordance with Amended Substitute Senate Bill 261 of the 124th General Assembly of the State of Ohio), *Report of the Committee to Study State and Local Taxes* at 70 (published March 1, 2003; visited June 7, 2005) available at <http://tax.ohio.gov/taxstudy/CSSLT%20Final%20Draft.pdf> (hereinafter "Committee Report"). Nationwide, awards under programs similar to those used in Ohio have reached an estimated annual value of nearly $50 billion. Michael D. LaFaive, *Are Targeted Incentives Constitutional?*, Mackinac Ctr. For Pub. Pol'y (Dec. 1, 2003).

4. Respondents – ten Ohio taxpayers, two Michigan taxpayers, and three Ohio small businesses – filed suit over the Toledo incentive package, alleging that it was unconstitutional under the dormant Commerce Clause and Equal Protection Clause of the United States Constitution.

5. A panel of the United States Court of Appeals for the Sixth Circuit held that the investment tax credit, Ohio Rev. Code Ann. § 5733.33, was unconstitutional under the dormant Commerce Clause of the United States Constitution, but that the personal property tax exemption, Ohio Rev. Code Ann. § 5709, was constitutional. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004). The panel acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* at 743; *see also id.* at 749 ("The tax benefits under the Ohio statutes . . . are equally available to

domestic and foreign corporations. . . ."). Nonetheless, the panel held the investment tax credit unconstitutional, because the credit had the potential to "coerce" businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. *Id.* at 743-46. The panel so held even while conceding that the State of Ohio could have achieved the exact same economic effect without violating the Commerce Clause by paying a direct subsidiary to benefited companies rather than offering those companies a tax credit. *Id.* at 746.

## SUMMARY OF ARGUMENT

This case involves a constitutional question that affects hundreds of tax incentive programs across the country: whether an investment tax credit that is equally available to resident and non-resident businesses violates the dormant Commerce Clause doctrine's "non-discrimination" test. This Court should answer that question "no," because such an incentive program provides all businesses with equality of opportunity – any business that invests in the taxing state will receive a tax credit. To the extent this Court's dormant Commerce Clause jurisprudence suggests that a court must further examine whether a state tax incentive program has a "coercive" effect, this Court should clarify that investment incentives are constitutionally permissible, provided that they are equally available to residents and nonresidents of the taxing state, as does the Ohio tax program at issue here.

Ohio's investment tax credit program raises broader questions about the efficacy of the "non-discrimination" test and the validity of the dormant Commerce Clause

doctrine itself in this context. As various Justices of this Court have recognized, dormant Commerce Clause jurisprudence is a "quagmire," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), in large part because the doctrine lacks a textual basis in the U.S. Constitution. This Court should use this case as a vehicle for articulating a return to the proper and original understanding of the non-discrimination test, namely, a focus on discrimination against "interstate commerce" itself. Under this test, the dormant Commerce Clause prohibits only those state laws that both (1) discriminate between resident and foreign goods or businesses and (2) harm the national economy. Refocusing the inquiry on harm to the national economy will at least reduce, if not completely eliminate, the quagmire, and it will also correct an error of potentially monumental proportions, given the pervasiveness of state tax incentive programs like Ohio's. That is because the test does not bar competition between states *per se*, recognizing instead that competition can be consistent with the Commerce Clause's goal of promoting an efficient, integrated, national economy and will ultimately result in more, not less, commerce.

Alternatively, the Court should abandon the dormant Commerce Clause doctrine for evaluating state tax programs. Numerous other provisions in the United States Constitution are available to protect against true monopolistic abuses of power in such programs, and the Constitution fully authorizes Congress to rectify any perceived problems when these other protections are unavailable.

## I. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE DOCTRINE, BECAUSE THE CREDIT IS EQUALLY AVAILABLE TO IN-STATE AND OUT-OF-STATE BUSINESSES.

The United States Constitution authorizes "Congress . . . To regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I, § 8, cl. 3. On its face, the Commerce Clause authorizes Congress, rather than the courts, to ensure "an area of trade free from interference by the States." *Boston Stock Exchange*, 429 U.S. at 328. Nonetheless, this Court has grafted a "negative" or "dormant" aspect to the Commerce Clause, to limit the States' right to tax interstate commerce. *Cuno*, 386 F.3d at 742.

This Court articulated the current test for measuring state tax programs against the dormant Commerce Clause doctrine in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).[2] Under that test, a tax provision is constitutionally valid if "(1) the activity taxed has a substantial nexus with the taxing State; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state." *Cuno*, 386 F.3d at 742, citing *Complete Auto Transit*. Here, the parties agree that the Ohio investment tax credit satisfies parts one, two, and

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[2] The Court has adopted – and disposed of – many other tests under the doctrine. *See American Trucking Assocs. v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2426 (2005) (Scalia, J., concurring) (cataloguing the "various tests from [the Court's] wardrobe of ever-changing negative Commerce Clause fashions").

four of the *Complete Auto Transit* test; the only dispute is whether Ohio's tax program violations the "non-discrimination" test.

There is nothing "discriminatory" about the Ohio tax program. Even the Sixth Circuit panel properly recognized that "[t]he tax benefits under the Ohio statutes . . . are equally available to domestic and foreign corporations and classify corporations on the basis of new investment in economically depressed areas." 386 F.3d at 749; *see also id.* at 743 ("the investment tax credit at issue here is equally available to in-state and out-of-state businesses").

This equality of opportunity exists because the Ohio corporate franchise tax and accompanying investment tax credit apply only to business activity that takes place in Ohio. *See generally* Ohio Rev. Code Ann. §§ 5733.05, 5733.33. And the fact that Ohio's tax applies only to Ohio business activity distinguishes it from the tax programs this Court held unconstitutional in the three dormant Commerce Clause cases on which the panel relied, *Boston Stock Exchange*, 429 U.S. 318 (1977), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), each of which involved a tax on out-of-state business activity. *See Cuno*, 386 F.3d at 744 (noting that in *Boston Stock Exchange*, the tax program "caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales"); *id.* (discussing *Maryland v. Louisiana*, which involved Louisiana's first-use tax on natural gas extracted from the federally owned outer continental shelf); *id.* at 744-45 (analyzing *Westinghouse*, which involved New York's tax on Domestic International Sales Corporation

(DISC) subsidiaries without regard to where the DISC conducted or transacted business).[3] Accordingly, the Ohio investment tax credit is constitutional, and this Court should reverse.

## II. THIS COURT SHOULD CLARIFY THE "NON-DISCRIMINATION" PART OF THE DORMANT COMMERCE CLAUSE TEST.

Notwithstanding the equality of opportunity available to residents and nonresidents under Ohio's investment tax program, the Sixth Circuit struck down the program for violating the dormant Commerce Clause. The panel reached its conclusion based on plaintiffs' argument that Ohio is "coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." *Cuno*, 386 F.3d at 743.

Respondents' "coercion" or "anti-incentive" argument is suggested by *dicta* in some of this Court's decisions, as the panel observed. In *Boston Stock Exchange*, for example, this Court criticized New York's exchange tax program because it "foreclose[d] tax-neutral decisions." 429 U.S. at 331. Similarly, in *Maryland v. Louisiana*, this Court disapproved of Louisiana's first-use tax because it "encourage[d] natural gas owners involved in the production of [offshore] gas to invest in mineral exploration and development within Louisiana rather than to invest in further [offshore] development or in production in other States." 451 U.S. at 757. In other words, there is language

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[3] Indeed, Westinghouse argued that New York "was taxing income that did not have a jurisdictional nexus to the State." 466 U.S. at 395-96.

in at least some of this Court's decisions that appears to endorse the notion that the "non-discrimination" test looks to equality of outcome, rather than or in addition to equality of opportunity. Under such a test, a tax program will be invalidated if the expected change in business behavior results in a benefit to one state at the expense of other states. Indeed, it was on this basis that the Sixth Circuit distinguished and sustained Ohio's personal property tax exemption. *See* 386 F.3d at 747-48 (citing a law review article explaining why a personal property tax exemption is "non-coercive").

The problem with an equality of outcome test for evaluating "non-discrimination" is that state competition or incentive for business investment can and often will advance the Commerce Clause objective of achieving an efficient, integrated national economy. If a business entity moves to a state where it will be more productive and contribute more to the national economy, the macro objective of an efficient, integrated economy will be advanced, even though the micro effect may be to disadvantage the economy of the deserted state. As one commentator has observed:

> If national wealth enhancement was a primary objective of the federalizing bargain, then efforts to increase the size of the social pie, by matching firms with their most productive jurisdiction, is not inconsistent with that bargain. To the contrary, it is entirely consistent as long as those economies, once realized, are available to all. Policies that have this purpose or effect are qualitatively different from a statutory scheme that merely transfers wealth or that creates an artificial monopoly that frustrates transactions that would otherwise occur.

Clayton P. Gillette, *The Law and Economics of Federalism: Business Incentives, Interstate Competition, and the Commerce Clause*, 82 Minn. L. Rev. 447, 483 (1997).

Moreover, when carried to its logical conclusion, the broader test for "non-discrimination" that the Sixth Circuit articulated and applied will result in absurd outcomes. For example, if Ohio chooses to attract more business investment by eliminating its business tax completely, no one could dispute that Ohio is free to join the other states that have already done so. But under the Sixth Circuit's broad test, elimination of all business taxes is "discriminatory," because it benefits only businesses located in Ohio, impermissibly incentivizing non-Ohio businesses to relocate there. This result makes no sense, yet, it is the natural consequence of a broader test that examines equality of outcome rather than equality of opportunity. *See* Edward A. Zelinsky, *Cuno v. Daimler-Chrysler: A Critique*, 34 State Tax Notes 37, 38 (Oct. 4, 2004).

Accordingly, if this Court is to continue recognizing a dormant Commerce Clause doctrine in this context at all, it is essential that the Court make clear that state incentives are not inherently unconstitutional. Rather, it is only when a state incentive diminishes the *national* economy that it runs counter to the Commerce Clause. "The free flow of interstate commerce is not an end in itself; it is an instrumental good, valued for its contribution to the efficient operation of the national economy." Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 Wm. & Mary L. Rev. 1191, 1216 (1998); *see generally American Trucking Assocs. v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2423 (2005) (the dormant Commerce Clause "prevents a State from 'jeopardizing the

welfare of the Nation as a whole'") (quotation omitted); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949) ("this Court has advanced the solidarity and prosperity of the Nation" by applying the dormant Commerce Clause doctrine). Thus, to the extent the "non-discrimination" test evaluates equality of outcome instead of or in addition to equality of opportunity, as the Sixth Circuit held, the test must be clarified to conform with the original understanding of the test. In other words, a tax cannot discriminate against "interstate commerce" itself. *Cuno*, 386 F.3d at 742 (citing *Complete Auto Transit*). Under this test, a state tax incentive program is invalid only if it both (1) discriminates between resident and foreign goods or businesses *and* (2) harms the national economy.

This "harm to the national economy" standard explains why state tariffs are "virtually *per se* invalid" under the dormant Commerce Clause. *Camps Newfound/ Owatonna v. Town of Harrison*, 520 U.S. 564, 565 (1997) (Thomas, J., dissenting) (citations omitted). A tariff artificially inflates the cost of competing goods, driving up prices and thus lowering demand. An escalating tariff war between competing states will inevitably result in a net decrease in commerce, the very evil the dormant Commerce Clause doctrine was created to prevent.

The "harm to the national economy" standard also explains why subsidies do not "ordinarily run afoul" of the Commerce Clause. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). Unlike a tariff, a subsidy artificially deflates the cost of competing goods, thereby lowering prices and increasing demand. An escalating subsidy war between competing states will result in a net increase in commerce.

Applying this test to the present case, Ohio's investment tax credit is permissible because, if replicated in all states that impose a business tax (the so-called "internal consistency" test, *see American Trucking*, 125 S. Ct. at 2425), it would result in lower corporate taxes and more national commerce. Just as states are permitted to compete for business investment based on their climate and the quality of their workforce, they should be allowed to use subsidies and tax abatements to bid for scarce investment resources, because competition is an effective way to allocate resources to the party that most highly values them.

A "harm to the national economy" test is also consistent with the precedent on which the Sixth Circuit relied below. In *Westinghouse*, the New York tax program increased tax liability proportionately with increases in export shipping activities in other states. *Cuno*, 386 F.3d at 745. If replicated in all states, this scheme would raise taxes nationally, just like a tariff, thus stifling commerce. The same is true in *Boston Stock Exchange*, where the New York tax program "caused transactions involving out-of-state sales to be taxed more heavily than transactions involving in-state sales." *Cuno*, 386 F.3d at 744. The anti-commerce effect was also present in *Maryland v. Louisiana*, where, if every state replicated Louisiana's tax program, all Outer Continental Shelf gas exploration and development would cease, notwithstanding the potential national economic benefits of pursuing OCS development.

In sum, a "harm to the national economy" test would first ask whether a state tax program treats in-state and out-of-state goods or businesses differently. The test would then examine whether the program will create a spiral of protectionism that raises prices and clogs commerce, or

inspires a competitive transformation in which each state must improve its own package to attract new capital.[4] This test, unlike the "non-discrimination" test the Sixth Circuit applied, draws a clear distinction between a tax program creating an artificial monopoly that inhibits transactions, and a program designed to attract investment by creating a competitive advantage that other states are free to copy.

## III. ALTERNATIVELY, THIS COURT SHOULD ABANDON THE DORMANT COMMERCE CLAUSE DOCTRINE IN THE CONTEXT OF STATE TAX PROGRAMS.

Although it is possible to preserve the dormant Commerce Clause doctrine while allowing states to compete for business investment, the fact remains that the doctrine "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting). Moreover, the doctrine alters the constitutionally proscribed balance of federalism by vesting interstate dispute resolution in the judiciary, instead of Congress, and it lacks a theoretical justification despite years of academic and judicial effort. The time is ripe for this Court to consider whether the doctrine should be abandoned entirely in the context of state tax programs.

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[4] "Discrimination" is still a necessary part of the test, even if the program is otherwise harmful to commerce. A state sales tax, for instance, if replicated in every state, would have the effect of raising prices and clogging commerce, but it does not violate the Commerce Clause because it is applied equally to all goods sold within a state's borders. All goods, whether produced in-state or out-of-state, have equality of opportunity.

The dormant Commerce Clause doctrine started quite innocently. Shortly after the thirteen colonies ratified the Articles of Confederation, they began to enact protectionist trade barriers:

> Massachusetts goods, for example, were subject to discriminatory duties in Connecticut, and Delaware goods were subject to similar duties in Pennsylvania. New York imposed clearance fees on coastal ships visiting its ports, and also imposed fees on boats carrying vegetables that were rowed across the Hudson River. Discriminatory duties almost immediately invited retaliation by other states in the form of imposition of similar duties.

Joseph F. Zimmerman, *Interstate Relations: The Neglected Dimension of Federalism* 117 (1996). *Accord Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005) ("The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. . . . Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.") (citations omitted).

Following the Constitution's ratification, this Court fashioned the dormant Commerce Clause doctrine to prevent the type of protectionist behavior evidenced during the days of the Articles of Confederation. As this Court stated in 1949:

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

> Restrictions so contrived are an unreasonable clog upon the mobility of commerce.

*H.P. Hood & Sons*, 336 U.S. at 539.

Since that time, however, this Court's foray into dormant Commerce Clause jurisprudence has wandered "well beyond the invalidation of obviously discriminatory taxes on interstate commerce." *Camps Newfound/ Owatonna*, 520 U.S. at 618 (Thomas, J., dissenting). In addition, the jurisprudence has failed to adapt to the increasing fluidity of economic transactions in a global economy.

When the doctrine was first created, a complex commercial transaction involved rowing vegetables across the Hudson River. Now, in a time when the gross revenue of some multi-national corporations exceeds the Gross National Product of many countries, Ohio competes not only with Maryland, but with Malaysia, Moldova, and Mexico for the benefits flowing from commercial transactions. *See* Vada Waters Lindsey, *Tax Incentive: The Vulnerability of Using Tax Incentives in Wisconsin*, 88 Marq. L. Rev. 107 (2004) (stating that "[m]ore than three million jobs have been lost in the United States during the last three years. Since March 2001, manufacturing jobs accounted for 90% of all job losses. Many jobs were lost to China, India, and Mexico"); Dave Carpenter, *Manufacturing Shifts Sow Uncertainty*, CHI. TRIB., Dec. 8, 2003, at 6 ("There's no statistical quibble about the impact of overseas competition. Numerous companies, from heavyweight multinational corporations to comparatively small firms, have switched production to low-priced labor sites in China, India or Mexico").

Meanwhile, the doctrine's shifting meaning and indeterminate tests have resulted in differing results "based merely 'on differing assessments of the force of competing analogies.'" *Camps Newfound/Owatonna*, 520 U.S. at 619 (Thomas, J., dissenting, quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 196 n.7 (1995)). And numerous past and present Justices of this Court have criticized the doctrine as nothing less than a morass. *See, e.g., Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 17 (1986) (Burger, C.J., concurring in part) (referring to "the cloudy waters of the Court's 'dormant Commerce Clause' doctrine"); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 701 (1981) (Rehnquist, J., dissenting) (recognizing that "the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused"); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959) (Clark, J.) (stating that the dormant Commerce Clause doctrine is a "tangled underbrush"); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 189 (1940) (Black, J., joined by Frankfurter and Douglas, J.J., dissenting) (criticizing the dormant Commerce Clause as arising out of "[s]pasmodic and unrelated instances of litigation [that] cannot afford an adequate basis for the creation of integrated national rules" that "Congress alone" is positioned to develop).

The present dispute is illustrative of the confusion and ambiguity the doctrine engenders. Respondents articulated below *eight* different tests for determining whether a tax was discriminatory. *See* Appellants' Sixth Cir. Br. at 22, 29. Petitioner DaimlerChrysler responded to many of these tests, then added another. *See* Appellee DaimlerChrysler's Sixth Cir. Br. at 29-34 (stating that "the

credit's similarity to a subsidy should be decisive"). Appellee State of Ohio recognized that "[t]he parties completely disagree ... on the lessons to be drawn from a careful analysis of the case law." *See* Appellee State of Ohio's Sixth Cir. Br. at 15.

In light of the pervasive problems the doctrine has caused, it is more than a little ironic that legislation has often cured state tax policies perceived to be anticompetitive, the very remedy that the Commerce Clause's text plainly endorses. For example:

> [T]he tax exemptions at issue in *Bacchus* were designed to expire and did expire. Thus, Hawaii's internal political processes ultimately eliminated those exemptions. Similarly, as to New York's securities transfer tax, Congress legislated while *Boston Stock Exchange* made its way through the courts. In the same vein, Congress has long legislated on the subject of milk prices and supports.

Edward A. Zelinsky, *Restoring Politics to the Commerce Clause*, 29 Ohio N.U.L. Rev. 29, 84 (2002)[5]; *accord Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (validity of a state tax program "is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve"). In short, Congress, the People's elected representative body, can and should decide in the first instance whether it is acceptable for Ohio to

[5] Conversely, Congress has also acted at times to give its blessing to challenged tax programs. *See, e.g.*, the McCarran-Ferguson Act, 15 U.S.C. § 1012(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.").

enact a tax credit program that encourages investment in Ohio.

Abandoning the dormant Commerce Clause doctrine in the context of state tax programs would not leave the states exclusively with a legislative remedy when faced with an alleged anti-competitive tax. Numerous other constitutional provisions have been and will continue to be used to strike blatantly protectionist tax programs. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 879-80 (1985) (rejecting dormant Commerce Clause challenge but holding that Alabama's higher gross premiums tax on foreign insurers violated the Equal Protection clause); *Toomer v. Witsell*, 334 U.S. 385, 396-98 (1948) (higher license fee on nonresident shrimp fishermen violated the Privileges and Immunities clause); *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 13-15 (1983) (invalidating Hawaii gross receipts tax imposed on airlines, concluding the tax was preempted under the Supremacy Clause by the Airport Development Acceleration Act of 1973); *cf.* U.S. Const. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .").

In sum, the time is ripe to extract the federal courts from the impenetrable "quagmire" that is the dormant Commerce Clause and return the job of overseeing competing state tax programs to Congress. This Court should take the opportunity presented by this case to abandon the doctrine as applied to state tax programs.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 04-1704

IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
*Petitioners*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

## INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners, DaimlerChrysler Corporation, *et al.*[1] Tax Executives Institute, Inc. ("TEI" or "the Institute") is a voluntary, non-profit association of corpo-

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners have filed consents to the filing of *amicus* briefs in support of either party with the Court. TEI has received the written consent of Respondents and has filed it with the Court.

rate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). TEI has approximately 5,700 members who represent more than 2,800 of the leading corporations in the United States, Canada, Europe, and Asia. Institute members represent a cross-section of the business community whose employers are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of all business taxpayers.

Today, TEI has nearly 600 members within the 4 states of the Sixth Circuit, and a majority of the Institute's other members work for companies whose activities (measured, for example, by property, payroll, or sales) extend into the Sixth Circuit. Moreover, many of these companies have availed themselves of the tax incentives at issue here (or to similarly structured incentives offered by other States). Because this case implicates the constitutionality of virtually every state and local tax incentive and, regardless of its disposition, may markedly affect all U.S. state and local tax systems, it is of interest to all TEI members.

By striking down Ohio's investment tax credit, the U.S. Court of Appeals for the Sixth Circuit upset the settled expectations of companies investing in new plants and equipment in Ohio in reliance on the tax credit. It also deprived Ohio (and similarly situated States) of an important and time-honored mechanism for encouraging job-creating investments. More fundamentally, the court's decision raises key issues under the Commerce Clause about the States'

freedom to compete for interstate commerce and foster economic development within their borders, as well as important issues of who may challenge a State's tax policy choices. As individuals who contend daily with the interpretation and administration of tax laws nationwide, the Institute's members—and their employers—have a vital interest in the proper disposition of this case.

## SUMMARY OF ARGUMENT

1. To foster economic growth and development, Ohio enacted an investment tax credit for businesses that install new manufacturing machinery and equipment in the State. DaimlerChrysler qualified for and claimed the credit following expansion of its vehicle-assembly plant in Toledo. DaimlerChrysler's entitlement to this credit was challenged by Ohio and Michigan citizens (collectively "Cuno") asserting the credit violates the Commerce Clause of the U.S. Constitution.

2. This case involves two questions: (a) Does Cuno have standing to bring this action? and (b) Does Ohio's tax credit discriminate against interstate commerce in violation of the Commerce Clause? As to the first question, *amicus* TEI submits that Respondents do not. As to the second question, *amicus* TEI submits that Ohio's tax credit does not discriminate against interstate commerce and the decision below misapprehends this Court's Commerce Clause jurisprudence.

3. The standing requirement emanates from Article III, § 2 of the Constitution, which limits the federal courts' jurisdiction to "cases" or "controversies."[2] It asks simply whether "a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[3] For a party to have standing, three elements must be satisfied: (1) the party must have suffered an injury

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[2] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

[3] *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

in fact, (2) the injury must be fairly traceable to the actions of the defendant, and (3) the injury must be redressable by a favorable decision.[4]

4. To satisfy the standing requirement, the Ohio and Michigan citizens here must show that they have suffered some actual or threatened injury as a result of the unlawful conduct of the State of Ohio in granting tax incentives to DaimlerChrysler and other manufacturers.[5] The injury must be distinct and palpable, not merely abstract, conjectural, or hypothetical. Conjectural or hypothetical possibility of injury —injury that is not "actual or imminent"—is insufficient.[6]

5. Even assuming Cuno is correct in averring that the investment tax credit "depletes the funds of the State of Ohio . . . thereby diminishing the total funds available for lawful uses" (an allegation at odds with the legislature's determination), the matter is one for the legislative or executive branch to address, not the courts. Indeed, there is no real injury alleged, and the challengers' generalized grievance is only an effort—disdainful of the separation-of-powers doctrine—to "vindicate their value preferences through the judicial process."[7]

6. More problematic than the ethereal nature of the challengers' alleged injury is that the declaratory and injunctive relief sought would do absolutely nothing to redress their supposed injury. Thus, the third element of standing evanesces, and Cuno's lack of standing is apparent.

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[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[5] *Valley Forge Christian Coll. v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[6] *Lujan*, 504 U.S. at 564.

[7] *Sierra Club*, 405 U.S. at 740.

7. During the past three decades, this Court has invoked the Commerce Clause to invalidate state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers.

8. In *Boston Stock Exchange v. State Tax Comm'n*,[8] this Court held a New York transfer tax that more heavily taxed stock transfers if they occurred outside the state to violate the Commerce Clause. Seven years after *Boston Stock Exchange*, the Court explained in *Westinghouse Electric Corp. v. Tully*,[9] that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The franchise tax scheme in that case was constitutionally flawed because the State imposed a greater tax burden on receipts from out-of-state DISC sales. *Bacchus Imports Ltd. v. Dias*,[10] decided the same year, dealt with a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages that did not facially discriminate against out-of-state distributors, but that violated the Commerce Clause by according reciprocal benefits to Hawaii's local liquor industry. More recently, in *New Energy Co. of Indiana v. Limbach*,[11] the Court struck down an ethanol tax credit applied against Ohio's motor vehicle fuel sales tax for fuel produced in the State, explaining that reciprocity will not remediate otherwise facial discrimination.

9. Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. Regrettably, the Court of Appeals misapprehended the Court's jurisprudence and improperly invalidated Ohio's investment credit. Specifically, not every difference in treatment constitutes discrimination.

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[8] 429 U.S. 318 (1977).

[9] 466 U.S. 388 (1984).

[10] 468 U.S. 263 (1984).

[11] 486 U.S. 269 (1988).

10. Four distinguishing characteristics of Ohio's investment tax credit at issue here render it constitutional: (a) Ohio is not discriminating against products manufactured or business operations performed in any other State, (b) the investment tax credit is not related to discrete transactions and it does not target a particular product or industry, (c) the amount of the credit does not change relative to activities in other states, and (d) Ohio's statute does not discriminate on its face but rather is freely available to any corporation engaging in the prescribed activities in Ohio.

12. Although this Court has invalidated state tax incentives, in each case it also affirmed the ability of the States to foster economic growth within their borders.[12] The Court observed that the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in exercising their power to tax turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[13] Thus, the distinguishing characteristics of the tax credit at issue are highly significant.

13. Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals muddled Commerce Clause jurisprudence, potentially leaving every state tax incentive vulnerable to challenge. While the limitations imposed by the Commerce Clause are real, they do not vitiate the power reserved to the States in our federal system. Where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face, and (c) does not directly burden out-of-state interests, it should be sustained.

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[12] *Boston Stock Exchange*, 429 U.S. at 336; *Westinghouse*, 466 U.S. at 407 n.12; *Bacchus*, 468 U.S. at 271; *New Energy*, 486 U.S. at 278.

[13] *Boston Stock Exchange*, 429 U.S. at 329.

14. Investment tax credits, along with an array of other tax incentives, are widely used by States to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base. Left intact, the Court of Appeals' determination will deprive States the ability to manage their economies and deny taxpayers the certainty they rightly need to plan and conduct their business affairs.

15. Should the result in this case remain unchanged, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and taxpayers will be upended.

## ARGUMENT

In 1997, Ohio enacted a tax credit to spur in-state capital investment.[14] Any company, whether or not already present in Ohio, could qualify for a 7.5-percent credit against its Ohio franchise tax liability by increasing its investment in manufacturing in the State. Further, capital investment occurring within specifically designated areas was eligible for an enhanced credit of 13.5 percent, thereby allowing the State to target economically depressed areas.

In 1998, DaimlerChrysler added a manufacturing facility to its existing plant in Toledo that satisfied the requirements for the enhanced investment tax credit. In addition, DaimlerChrysler negotiated a 10-year real property tax exemption with the City of Toledo.

In 2000, several Ohio and Michigan citizens (collectively, "Cuno") brought suit in the Lucas County, Ohio, Common Pleas Court, for declaratory and injunctive relief contending that Ohio's investment tax credit and the property tax exemption were unconstitutional. Specifically, Cuno argued

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[14] Ohio Rev. Code § 5733.33.

that the preferential treatment accorded in-state investment under Ohio law, as well as the property tax exemption granted by Toledo, discriminated against interstate commerce in violation of the Commerce Clause of the U.S. Constitution.[15] The case was removed to the U.S. District Court for the Northern District of Ohio, which dismissed the suit on a motion for failure to state a claim. On appeal, the Court of Appeals reversed, holding that the investment tax credit violated the Commerce Clause. At the same time, the Court found that Ohio's property tax incentive did not violate the Commerce Clause.[16]

This Court granted DaimlerChrysler's petition for a writ of certiorari (as well as the companion petition by Ohio and the city of Toledo), which framed the issue as whether Ohio's investment tax credit violates the Commerce Clause.[17] In doing so, the Court asked the parties to address whether Cuno has standing to challenge the Ohio statute.

## I. CUNO LACKS STANDING TO CHALLENGE OHIO'S INVESTMENT TAX CREDIT

The standing requirement emanates from Article III, § 2 of the Constitution, which limits the federal courts' jurisdiction to "cases" or "controversies."[18] It differs from other issues because it focuses not on the substantive questions to be adjudicated, but rather on the parties to a dispute, asking

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[15] U.S. CONST. art I, § 8, cl. 3.

[16] App. 1a. "App." references are to the various appendices bound with the Petition for a Writ of Certiorari, *DaimlerChrysler Inc.*, et al. *v. Charlotte Cuno*, et al., No. 04-1704 (filed Jun. 17, 2005). The real property tax exemption is the subject of Cuno's Petition for a Writ of Certiorari in *Charlotte Cuno*, et al. *v. DaimlerChrysler Inc.*, et al., No. 04-1407 (filed Apr. 18, 2005).

[17] Cuno's Petition for a Writ of Certiorari is pending with the Court.

[18] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

simply whether "a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[19] As Justice O'Connor wrote in *Allen v. Wright*,[20] to have standing "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[21]

For a party to have standing, three elements must be satisfied: (1) the party must have suffered an injury in fact, (2) the injury must be fairly traceable to the actions of the defendant, and (3) the injury must be redressable by a favorable decision.[22] Because Cuno has not suffered any injury in fact, there is no harm for the Court to redress, and thus it follows that Cuno cannot satisfy the second and third standing elements.

To satisfy the standing requirement, the Ohio and Michigan citizens here must show that they have suffered some actual or threatened injury as a result of the unlawful conduct of the State of Ohio in granting tax incentives to Daimler-Chrysler and other manufacturers.[23] The injury must be distinct and palpable, not merely abstract, conjectural, or hypothetical. Thus, if a State's action has barred or otherwise interfered with prospective business activities, the standing requirement is satisfied.[24] If the harm has not already occurred, there must be sufficient threat of actual injury—

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[19] *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

[20] 468 U.S. 737 (1984).

[21] *Id.* at 751. *See United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring) ("a plaintiff must allege some particularized injury that sets him apart from the man on the street.")

[22] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[23] *Valley Forge Christian Coll. v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[24] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

"concrete in both a qualitative and temporal sense"—to satisfy the injury in fact requirement.[25] Conjectural or hypothetical possibility of injury—injury that is not "actual or imminent"—is insufficient.[26] Hence, this Court has determined that cases raising a generalized grievance would meet the injury-in-fact requirement only where there is a clear showing that the action challenged has caused or will cause an individual injury and that a judicial pronouncement of rights will be likely to redress that injury.[27]

"Generalized grievance" is a generous term for Cuno's supposed injury in this case. The Ohio taxpayers challenged the investment tax credit because the credit "depletes the funds of the State of Ohio . . . thereby diminishing the total funds available for lawful uses." They aver that because Ohio funds are diminished, "disproportionate burdens" are (or will be) imposed on them. Even assuming Cuno is correct in alleging that state revenues would decline (an allegation at odds with the legislature's determination), the matter is one for the legislative or executive branch to address, not the courts. Indeed, there is no real injury alleged, only an effort by the challengers—at odds with the separation of powers doctrine—to "vindicate their value preferences through the judicial process."[28]

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[25] *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

[26] *Lujan*, 504 U.S. at 564.

[27] *Sierra Club*, 405 U.S. at 734-35.

[28] *Id.* at 740. Cuno's challenge represents nothing more than a "man on the street" (*see United States v. Richardson*, 418 U.S. at 194) effort to use the courts to address a question of broad public significance—the propriety of state tax incentives. Thus, it runs counter to the Court's declining, on prudential grounds, to find standing in cases involving "abstract questions of broad public significance pervasively shared and most appropriately addressed in the representative branches" of government. *See Valley Forge*, 454 U.S. at 474-75.

So, too, with the Michigan taxpayers, who complain that DaimlerChrysler was induced by Ohio's investment tax credit to expand its existing operation in Toledo, rather than relocate the operation elsewhere, say, in Michigan. They speculate that the jobs and tax revenues generated by Daimler-Chrysler's operation in Ohio would otherwise inure to the benefit of Michigan, thereby reducing their local tax burden. More problematic than the ethereal nature of this alleged injury is their requested relief (an injunction against operation of Ohio's investment tax credit), which would do absolutely nothing to relocate DaimlerChrysler's facility from Toledo to Michigan.[29] That no judicial determination could begin to redress their supposed injury exposes their lack of standing.

## II. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE COMMERCE CLAUSE

During the past three decades, this Court has invoked the Commerce Clause to invalidate a number of state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers. While the Sixth Circuit was correct to consider those decisions in weighing the constitutionality of the Ohio investment tax credit, the court below erred in ruling the Commerce Clause mandated its decision. Indeed, a careful review of the cases confirms that, while "the scope of the doctrine that bars discriminatory taxes has not been clearly delineated,"[30] the Sixth Circuit distended the applicable precedents in striking down Ohio's investment tax credit.

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[29] One member of Cuno is a small business whose real property was condemned by the city of Toledo using its eminent domain power. This property is now occupied by DaimlerChrysler's expanded facility. The declaratory and injunctive relief sought by Cuno, however, would do nothing to redress this displacement, and thus even this member of Cuno fails to meet the third element of standing.

[30] App. at 5a.

In *Boston Stock Exchange v. State Tax Comm'n*,[31] this Court struck down a New York transfer tax that more heavily taxed stock transfers occurring outside the state. A unanimous court concluded that "because it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York tax . . . falls short of the substantially evenhanded treatment demanded by the Commerce Clause."[32] Holding that "no state may discriminatorily tax the products manufactured or the business operations performed in any other state,"[33] *Boston Stock Exchange* has provided a clarifying lens for reviewing the constitutionality of state taxing schemes.

Seven years after *Boston Stock Exchange*, the Court took up the issue of discriminatory taxation in *Westinghouse Electric Corp. v. Tully*,[34] a case involving a franchise tax credit. Following enactment of a federal tax law granting preferential treatment to export sales by "Domestic International Sales Corporations" (DISCs), New York amended its tax statute to include income from DISC sales in the income of the parent corporation for New York corporate tax purposes. At the same time, New York provided a tax credit that varied depending on whether the DISC sales originated in New York as well as on the relative proportions of the taxpayer's New York and non-New York DISC sales. It was the credit provisions that prompted the Court to strike down the New York scheme as discriminatory. Citing *Boston Stock Exchange*, the Court said that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The tax scheme was constitutionally flawed because the

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[31] 429 U.S. 318 (1977).

[32] *Id.* at 332.

[33] *Id.* at 337.

[34] 466 U.S. 388 (1984).

manner in which the credit was computed created a greater tax burden on receipts from out-of-state DISC sales.[35]

In 1984, the Court also decided *Bacchus Imports Ltd. v. Dias,*[36] a case involving a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages. Although the statute did not facially discriminate against out-of-state distributors, the Court found that the reciprocal benefit afforded to Hawaii's local liquor products and industry violated the Commerce Clause.

*Westinghouse* and *Bacchus Imports* crystallized the governing principles in this area, affirming the core holding of *Boston Stock Exchange*, and answering some remaining questions. First, the prohibition on discriminatory taxes applies not only to indirect, transaction-based taxes (like the transfer tax in *Boston Stock Exchange*), but also direct taxes, such as income taxes. Second, the bar reaches tax schemes providing a tax benefit (credit or exemption) to in-state businesses or operations, as well as state statutes penalizing out-of-state activity. Finally, tax statutes need not be discriminatory on their face to be inimical to the Commerce Clause.

More recently, the Court addressed the constitutionality of a state tax credit in *New Energy Co. of Indiana v. Limbach.*[37] There, the Court addressed a challenge to an ethanol tax credit against Ohio's motor vehicle fuel sales tax for fuel produced in the State. Although the credit was available in a reciprocal fashion for ethanol produced in other States to the extent such States provide a credit for ethanol produced in Ohio, the Court struck it down on the grounds that the Ohio provision "explicitly deprives certain products of generally available beneficial tax treatment because they are made in

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[35] *Id.* at 400-01.

[36] 468 U.S. 263 (1984).

[37] 486 U.S. 269 (1988).

certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination."[38] Thus, *New Energy* clarified that reciprocity will not remediate otherwise facial discrimination.

Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. While Ohio's investment tax credit was intended to and, in fact, did provide an incentive to taxpayers to invest in the State, *amicus* TEI submits the statute does not run afoul of the neutrality required by the Commerce Clause. Rather, misapprehending the nuances and significance of the Court's jurisprudence, the Court of Appeals erred in invalidating Ohio's investment credit.

TEI submits that distinguishing characteristics of Ohio's investment tax credit enable it to pass constitutional muster. Unlike the circumstances in *Boston Stock Exchange*, Ohio is not discriminating against products manufactured or business operations performed in any other State. Indeed, the credit here does not relate to a transaction tax at all, but rather to the State's franchise tax. The tax credit is also distinguishable from the exemption in *Bacchus* because, first, it is not related to a transactional tax, and second, it does not target a particular product or industry. As for *Westinghouse*, the tax credit is different because the amount does not change relative to activities in other States. In other words, the Ohio investment tax credit encourages increased investment in the State (like the *Westinghouse* credit), but it does not directly penalize additional investment in other States (unlike the *Westinghouse* credit). Indeed, since the credit applied to Ohio's corporate franchise tax, the tax involved only applies

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[38] *Id.* at 274.

to activities in Ohio.[39] Moreover, although the credit in *Westinghouse* was applied against New York's corporate income tax, it was calculated on a transaction-by-transaction basis (*i.e.*, on the basis of DISC sales); here, Ohio's investment tax credit was computed on the basis of the company's investment in plant and equipment. Finally, unlike the statute in *New Energy*, the Ohio tax credit is, again, not transaction based and does not discriminate on its face: It is available to any corporation engaging in the prescribed activities in Ohio, and reciprocity is not an issue.

These distinctions are highly significant given this Court's recognition that States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry" and may "compete with other States for a share of interstate commerce."[40] As the Court observed in *Boston Stock Exchange*, when making the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in the exercise of their power to tax, the result turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[41]

Not every difference in treatment constitutes unconstitutional discrimination. Although this Court invalidated the state tax incentives in *Boston Stock Exchange* and the other cases, each time it also affirmed the ability of the States to foster economic growth within their borders. Thus, the Court declared in *Boston Stock Exchange* that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intra-

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[39] The credit in *Westinghouse* varied depending on the relative proportion of the taxpayer's New York and non-New York sales. 466 U.S. at 400.

[40] *Boston Stock Exchange*, 429 U.S. at 336-37.

[41] *Id.* at 329.

state commerce and industry."[42] In *Westinghouse*, the Court averred that "[w]e do not hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy,"[43] and elaborated in *Bacchus* that "[a] State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."[44] And in *New Energy*, the Court confirmed that the Commerce Clause "does not prohibit *all* state action designed to give its residents an advantage in the marketplace."[45]

This Court's decisions teach that where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face (*i.e.*, its effect is readily available to all), and (c) does not directly burden out-of-state interests, it should be left intact. Where both in-state and out-of-state companies are eligible to receive investment tax credits, as in the case here, the Commerce Clause should not preclude such incentives. In other words, tax incentives should be sustained so long as they do not penalize out-of-state activity. Because any taxpayer, including non-domiciliary companies such as DaimlerChrysler here, may avail itself of the benefits afforded by the Ohio investment credit, the credit should be sustained. This is the essence of the free-trade and open competition that the Commerce Clause should permit while guarding against predatory and discriminatory state practices.

Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals fashioned a decision that muddles Commerce Clause jurisprudence and potentially

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[42] *Id.* at 336.

[43] 466 U.S. at 407 n.12.

[44] 468 U.S. at 271.

[45] 486 U.S. at 278 (emphasis added).

leaves every state tax incentive vulnerable to challenge. Indeed, since the Sixth Circuit rightly upheld the property tax exemption that DaimlerChrysler claimed regarding the new plant and equipment, while striking down the investment tax credit, it is difficult to fathom what type of incentives might survive scrutiny.

In summary, while the limitations imposed by the Commerce Clause are real, the Clause does not vitiate the power reserved to the States in our federal system. Nearly all States have some type of tax incentive to encourage in-State economic activity, and more than 30 offer an investment tax credit analogous to Ohio's. In California, for example, placing qualifying property into service after January 1, 1994, yielded a manufacturer's investment credit for many taxpayers.[46] In Illinois, taxpayers may claim a credit in respect of qualifying property placed in service between July 1, 1984, and January 1, 2004.[47] And in New York, an investment tax credit related to qualifying property acquired after December 31, 1968, is available to taxpayers.[48] These are just three examples of investment tax credits; by one recent count, there are more than 330 income or franchise tax incentives.[49] More fundamentally, the Court of Appeals' decision implicates even the most neutral (and basic) tax policy decisions, such as lowering a tax rate or narrowing a tax base compared with other states, as "discriminatory." Accordingly, the Court should reverse the decision below.

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[46] Cal. Rev. & Tax. Cd. § 23649(a)(1). The California credit is not available for property placed in service after January 1, 2004.

[47] Ill. Admin. Code 86 § 100.2101(a).

[48] N.Y. Tax Law § 210(12).

[49] Timothy H. Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. Tax'n 359, 360 (2005) (citing Mark L. Nachbar, *Credits and Incentives: Alabama Through Hawaii*, 1450 T.M. (BNA) (2005)).

## III. THE DECISION BELOW UPENDS SETTLED EXPECTATIONS OF BOTH BUSINESSES AND THE STATES

Investment tax credits, along with an array of other tax incentives, are widely used by states to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base. If not reversed, the Court of Appeals' determination will reverberate across the country to the detriment of taxpayers and States alike. States will be denied the ability to manage their economies and taxpayers will be deprived of the certainty they rightly need to plan and conduct their business affairs.

The importance of Ohio's investment tax credit is beyond dispute: In this case alone, it spurred the creation or retention within the State of more than 4,000 jobs and prompted a $1.2 billion expansion by DaimlerChrysler.[50] In 2004, Ohio's Development Director worked with more than 193 companies to expand or locate in Ohio, representing more than 53,000 jobs in Ohio.[51] And Ohio is not just competing with other States: It, like other States, faces increasing competition from Canada, Mexico, and Asia to secure and retain businesses. Ohio, through this credit, is simply pursuing a tax policy strategy to encourage investment within its borders and boost its economy.

Should the result in this case be affirmed, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and taxpayers upended. Not only will taxpayers that have detri-

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[50] The Honorable Bruce Johnson, Lt. Governor & Dir., Ohio Dep't of Dev., Testimony before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives (May 24, 2005) (transcript available in *amicus* TEI's offices).

[51] *Id.*

mentally relied on the States' actions be severely disadvantaged, but the attendant uncertainty will discourage further investment by other taxpayers and thus frustrate the States' incentive efforts. The Court should reverse the decision below and in so doing, clarify the Commerce Clause's bar on discriminatory taxation and restore certainty to the area.

## CONCLUSION

For the foregoing reasons, the Court should vacate or, in the alternative, reverse the decision below invalidating Ohio's investment tax credit.

Respectfully submitted,

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December 1, 2005

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Nos. 04-1704 and 04-1724

IN THE

# Supreme Court of the United States

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DAIMLERCHRYSLER CORPORATION, ET AL.,
*Petitioners*,

v.

CHARLOTTE CUNO, ET AL.,
*Respondents*.

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WILLIAM W. WILKINS, TAX COMM'R, OH, ET AL.,
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v.

CHARLOTTE CUNO, ET AL.,
*Respondents*.

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**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITIONERS

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**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITIONERS

---

## INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of petitioners in the above-captioned matter.[1]

The Tax Foundation is a non-profit research organization formed in 1937 to educate taxpayers about sound tax policy. In this regard, the Tax Foundation disseminates information on taxes and promotes tax systems that are simple, fair, and favor economic growth. The Tax Foundation works to further this mission by educating the legal community on economic issues relating to tax law, educating lawmakers and the public on tax law issues in an understandable and relevant manner, and advocating that judicial decisions on tax law promote economic growth and tax competition.

## SUMMARY OF ARGUMENT

As a threshold matter, it is critical to examine whether any respondent has standing to bring this suit. Each respondent lacks Article III standing, as any alleged injury is general, speculative, and attenuated. Further, a favorable decision would be unlikely to provide relief. Respondents in this case seek to change what they consider bad tax policy, not to address individual injuries. Such a grievance should be addressed to the legislature.

On the merits, respondents seek to transform this Court's past discussion of "tax neutrality" into a mandate for tax conformity. Disregarding this Court's clear recognition of the importance of permitting States to design tax systems that

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents of petitioners and respondents have been obtained and filed with the Clerk of the Court.

foster a competitive business climate, respondents would have the Commerce Clause interpreted to preclude any tax measure that might affect capital investment decision-making.

Clarification is needed as to which types of competitive tax advantages States may enact consistent with the Commerce Clause. Further, this Court should take this opportunity to explain its statements about tax neutrality in previous decisions, which respondents have misinterpreted in pressing this lawsuit, and which have left lower courts, commentators, and economists struggling to articulate its import for the scope of the dormant Commerce Clause. A clarification that the Commerce Clause requires competitive neutrality, not tax or economic neutrality, would lift uncertainty surrounding programs that encourage investment. The Commerce Clause prohibits tariff-like coercion and punishment of out-of-state activity, not every law that affects economic decision-making.

## ARGUMENT

### I. RESPONDENTS LACK STANDING TO CHALLENGE OHIO'S TAX CREDIT PROVISION.

The respondents, plaintiffs below, are merely concerned citizens. They believe that tax credits like Ohio's are bad tax policy. As a matter of tax policy, Amicus agrees with the respondents. None of the respondents, however, were directly injured by this credit and none would directly benefit from any judicial ruling in this matter. Their grievances are with the State's policy decisions and should be directed to the legislatures, not to the courts.

Minimum standing requirements are imposed by the Constitution and additional standing requirements have been

adopted for prudential reasons to prevent the politically disappointed from bringing legislative questions into a judicial forum. The law of "standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Respondents lack standing under both standards.

**A. Respondents lack Article III standing.**

According to their own complaint, the respondents are individual residents of Ohio, one not-for-profit Ohio corporation, two for-profit Ohio corporations, and individual residents of Michigan. Compl. ¶¶2–6. At least seventeen of the nineteen respondents were therefore not subject to Ohio's franchise tax at all. None of the respondents actually allege that they are subject to Ohio's franchise tax, or have been required to pay a tax or incur any other particular liability as a result of the challenged tax credit. *Cf., e.g., General Motors Corporation v. Tracy,* 519 U.S. 278, 286–87 (1997) (stating that taxpayer had standing to challenge a tax that it, itself, had paid).

The respondents do not claim that the challenged credit directly discriminated against them. None claim, for example, to be Ohio businesses that chose to invest outside the State instead of inside the State. *See Allen v. Wright,* 468 U.S. 737, 755 (1984) (ruling that only those who are personally discriminated against have standing to challenge the discrimination). None claim that Ohio required them to pay a tax imposed only on, or more heavily on, non-residents. *Cf., e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (holding that taxpayer had standing to challenge a tax that discriminated against imported products that directly affected its business). None even claim to be competitors with anyone who benefits from the credit. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321, n.3

(1977) (holding that out-of-state stock exchanges had standing to challenge discriminatory tax scheme that diverted transactions to in-state exchange).

Accordingly, none of the respondents are the "object of the action (or forgone action) at issue." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

**1. Ohio respondents' interests as citizens and taxpayers do not give them standing.**

None of the Ohio respondents meet the "irreducible constitutional minimum" of Article III standing: concrete and particularized "injury in fact," caused by the conduct complained of, and likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560.

The Ohio respondents' allegations that, as a result of the credit, the tax revenues of their State have been diminished, and that the credit "shifts to the Ohio [respondents] a disproportionate burden of supporting these government functions," are insufficient. Compl. ¶¶22, 40, 42. While tax credits do generally narrow the tax base, the injuries alleged by respondents are neither concrete nor particularized. A citizen's and taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention]." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (quotations omitted). Standing is not established by a state taxpayer's showing that "he suffers in some indefinite way in common with people generally." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952) (quotations omitted).

Moreover, the causal connection between the tax credit offered to businesses that make large investments in Ohio and either lower tax revenues for Ohio or higher tax impositions on the Ohio respondents is, at best, tenuous. Respondents are only speculating that Ohio's tax revenues will decline as a result of this credit. The credit may, in fact, have the opposite effect. For example, DaimlerChrysler's investment in Ohio may well increase the State's revenues. DaimlerChrysler is likely buying supplies and contracting with service providers in Ohio. It is employing individual taxpayers in Ohio. The state tax revenues attributable to these vendors and employees, and to DaimlerChrysler itself, might actually increase as a result of the credit.

The Ohio respondents offer nothing to demonstrate that the credit will diminish overall state tax revenues. Even if respondents had a cognizable interest in reduced state revenues, which they do not, their claim that this has or will occur is entirely speculative. In addition, the alleged causal link is too attenuated. Whether Ohio's revenues increase as a result of the credit hinges on "unfettered choices made by independent actors" — investment, purchasing, and employment decisions made by various persons. *ASARCO*, 490 U.S. at 615. None are responsible for enacting the tax credit or capable of rescinding it.

Finally, the requirement that a favorable decision is likely to redress respondents' alleged injuries is not met. A favorable decision might just as likely exacerbate the alleged injuries as redress them. For example, if this Court were to uphold the Sixth Circuit and determine that the tax credit is unconstitutionally discriminatory in violation of the Commerce Clause, Ohio could fully redress such a constitutional violation by extending the credits to additional businesses. *See McKesson Corp. v. Division of Alcoholic*

*Beverages*, 496 U.S. 18, 50 (1990). By respondents' reasoning, that would further reduce the State's tax revenues.

Thus, the Ohio respondents have no cognizable interest in the injury they allege and there is no basis to conclude that the injury does or will even exist. Even if it did exist, the connection to the challenged provision is highly attenuated. And there is no basis to conclude that a favorable decision is likely to redress such injuries if they do exist. Each conclusion independently precludes respondents from maintaining this suit.

**2. Michigan respondents do not have standing.**

The Michigan respondents' allegations that, as a result of the credit, the tax revenues of their State have been diminished, that this shifts a disproportionate tax burden to them, and that they have been deprived of employment opportunities, is similarly insufficient. Compl. ¶ 42. The tax revenue allegations, like the parallel allegations of the Ohio respondents, is not cognizable because it is remote, indeterminable, and lacks certainty. *ASARCO*, 490 U.S. at 613. In addition, the causal connection between any of their alleged injuries and the tax credit, and the likelihood of a favorable decision redressing such injuries, is even more speculative with respect to the Michigan respondents than the Ohio respondents.

Michigan respondents' allegations that they have standing are based on two conclusions. First, DaimlerChrysler would not have chosen to locate its plant in Ohio, absent the tax credit. Second, if DaimlerChrysler had ruled out Ohio, it would necessarily have built the plant in Michigan instead. Both are entirely speculative. With respect to the first, there is no basis to conclude that DaimlerChrysler did not base its location decision on a variety of considerations in addition to the tax credit. Taxes are

important to a state's business climate, but so is the quality of the work force and transportation systems. Even respondents' counsel concluded in his academic writings that tax credits alone rarely cause companies to make location decisions. *See* Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 390–93 (1996).

With respect to the second, there is no basis to conclude that Michigan was the only, or even the most plausible, alternative if DaimlerChrysler had not chosen to build the plant in Ohio. Respondents provide nothing to substantiate their guesswork. And because the alleged injury hinges entirely on the "unfettered choices made by independent actors" – DaimlerChrysler – it is too attenuated to satisfy Article III's causality requirement.

The same "unadorned speculation" defeats any claim that a decision finding the tax credit invalid would redress Michigan respondents' alleged injuries. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 (1976). There is no basis to conclude that, if the tax credit were found invalid, Ohio would rectify the identified Commerce Clause violation by rescinding the credit, or that if it did, DaimlerChrysler would tear down its Ohio plant and build a new plant in Michigan. No other businesses are identified or alleged to be in the process of or likely to make an investment decision between Ohio and Michigan in the foreseeable future.

The connection between the Ohio tax credit and their alleged lost "economic opportunities in the form of jobs" is even weaker. Compl. ¶ 42. Even if it were possible to accept all the conjecturing necessary to conclude that, but for the tax credit, DaimlerChrysler would have built its plant in Michigan, there would still be no basis to conclude that such

an action would have provided jobs to the Michigan respondents. They do not identify what jobs would be created, whether they have the requisite skills to perform those jobs, whether the competition for employment in Michigan is such that they would have a reasonable assurance of obtaining employment, whether the new jobs would be preferable to any jobs they may currently hold, why they believe any such jobs would be located near their homes, or whether they would be prepared to move if they were not. Michigan is a large State. Moreover, the fact that they did not move to Ohio to obtain the same employment opportunity they claim to have been denied would undermine any allegations that they would move from one side of Michigan to the other for such a job and would be hired if they did move.

The likelihood that these alleged lost "economic opportunities" would be redressed by a favorable decision is even more speculative, as discussed above. If the tax credit were invalidated, the State could remedy any discrimination by extending the credit to those identified as discriminated against. *That* would certainly not provide the Michigan respondents with the "economic opportunities" they claim to seek. Even if the tax credit were rescinded, there is no basis to conclude that DaimlerChrysler would tear down its Ohio plant and build a new plant in Michigan, or that if it did, the Michigan respondents would apply, qualify, and be hired at that plant.

### 3. Respondents' eminent domain displacement does not give them standing.

The harm alleged by some respondents—that they were displaced by City of Toledo's exercise of eminent domain—is also insufficient. *See* Compl. ¶¶ 2, 23, 41. Displacement by the exercise of eminent domain can certainly impose

distinct and particularized injuries. However, the displacement alleged here is not causally linked to the challenged *tax credit.* Moreover, the injuries alleged by respondents do not appear to still be in need of redress.

The claims of the one displaced corporate respondent have already been addressed through extensive litigation directed at the exercise of eminent domain itself, which resulted in payment of compensation, determined to be adequate by a court. *See, e.g., City of Toledo v. Kim's Auto & Truck Service, Inc.*, 2003 WL 22390102 at *2 (Ohio App. 6th Dist. 2003) *appeal not allowed*, 804 N.E.2d 42 (Ohio 2004), *stay denied*, 811 N.E.2d 1148 (Ohio 2004), *cert. denied*, 72 U.S.L.W. 3750, 73 U.S.L.W. 3754, 73 U.S.L.W. 3755 (U.S. Jun. 28, 2005) (No. 03-1629). The individual respondents who claim to have been displaced do not allege that they were insufficiently compensated for the injury of relinquishing their property.

Even if there were still some uncompensated injury, its connection to the tax credit is entirely speculative. There is no basis to assume that, absent the credit, the city would not have exercised eminent domain. First, there is no basis to assume that DaimlerChrysler would not have chosen to build its plant on that land absent the credit. *See* Enrich, 110 HARV. L. REV. at 390-93; Op. Cert., *DaimlerChrysler Corp. v. Cuno*, No. 04-1704 and 04-1724, at 7 (stating that the actual influence of state tax incentives on business location decisions is, "at most, marginal"). Second, the characteristics of the property and the neighborhood that persuaded the city to make the property available to DaimlerChrysler might very well have persuaded the city to make the property available for a different use if DaimlerChrysler had decided not to build its plant there.

Finally, any injury attributable to the city's decision to exercise eminent domain would not be redressed by

invalidating the credit. If the tax credit were found invalid under the Commerce Clause, the State can remedy the invalidity without rescinding the credit. Even if the State chose to cure by rescinding the credit, that would affect the taxes owned by DaimlerChrysler, not the ownership of the land or whether the former owners' homes and business would be rebuilt after demolishing the plant. No decision by this Court or the courts below, with respect to the tax credit, could remedy the harms these respondents have suffered through displacement. Those harms can only be remedied by challenging the exercise of eminent domain itself or negotiating for adequate compensation, which these respondents have apparently already done.

In sum, none of respondents satisfy Article III's standing requirements.

### B. Respondents also do not satisfy this Court's "prudential" standing requirements.

Jurisdiction is also, independently, unavailable for prudential reasons. Their suit presents "'abstract questions of wide public significance' which ... [are] most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982) (internal citation omitted).

The respondents present generalized grievances appropriately addressed in the legislature. They think tax credits make bad public policy. Op. Cert. at 6. They further argue that credits, such as Ohio's, are ineffective at actually bringing jobs to a State. *Id.* at 7. Their goal is not to redress individual injury, but to fix what they perceive to be bad public policy. They are aware that tax policy and economic development are subjects with which legislatures grapple. Their counsel has written in academic journals that these

credits are highly politicized and a subject of robust debate in the state legislatures. *See* Enrich, 110 HARV. L. REV. at 393–97.

It is because the proponents of credits keep winning this political debate, *id.*, that respondents and their counsel have decided that courts would be a more effective forum for them to advance their policy agenda. *See* Enrich, 110 HARV. L. REV. at 405–22. Respondents are trying to use the courts to remedy what they believe to be the self-destructive behavior of the Ohio legislature. This lawsuit is, as their counsel describes, an effort to "save Ohio from Ohio." *See* Enrich, 110 HARV. L. REV. at 377 ("Saving the states from themselves.").

In addition, whether respondents are viewed jurisprudentially as attempting to assert the rights of third parties or being outside the zone of interests protected by the dormant Commerce Clause doctrine, respondents are not appropriate parties to raise these claims. Because respondents do not allege that the tax credit discriminates against them by imposing a discriminatory tax on them or placing them at a competitive disadvantage, they are not even "arguably within the zone of interests to be protected ... by the ... constitutional guarantee in question." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977) (quotation omitted). The right to complain that a state law is discriminatory in violation of the Commerce Clause belongs to those against whom the law discriminates. *Id.*

It is well-settled that respondents may not assert the rights of others who arguably were discriminated against, if the tax credit in fact violates the Commerce Clause. *See Kowalski v. Tesmer*, 543 U.S. __, 125 S.Ct. 564, 567 (2004). Third party standing is available only to those who have a particularly close relationship to the parties whose rights were allegedly violated and only if those parties are hindered in their ability

to protect their own interests. *Id.* Respondents do not identify anyone who was or is discriminated against by the tax credit, much less allege the required close personal relationship with that person. Likewise, respondents do not allege that such parties are hindered in their ability to protect their own interests. *Id.* Such an allegation would be particularly dubious here because any party that could be discriminated against by the challenged franchise tax, in violation of the Commerce Clause, would necessarily be a business. Hundreds, perhaps thousands, of cases attest that businesses are not hindered in their ability to protect their economic interests from an unlawful tax. *See, e.g., Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (Commerce Clause challenge to state tax by business); *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of Oregon*, 511 U.S. 93 (1994) (same).

Thus, even if respondents could meet Article III's requirements, which they cannot, they nonetheless lack standing under this Court's established prudential standing doctrines. The respondents mean well, from a policy perspective, but allowing them to bring their claims would threaten to make the federal courts a forum for generalized tax policy grievances.

## II. THE COMMERCE CLAUSE REQUIRES, AT MOST, COMPETITIVE NEUTRALITY, NOT ECONOMIC TAX NEUTRALITY.

The decision below suggests that state tax systems must be neutral with respect to business investment decisions. Thus, the Sixth Circuit explained its ruling that the Ohio tax credit is unconstitutional on the ground that "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and ... the result is to hinder free trade among the states." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 745

(6th Cir. 2004).[2] Requiring state tax economic neutrality, however, imposes state tax conformity. This Court has never ruled that the Commerce Clause requires this type of neutrality.

With the increase in labor and capital mobility in recent years, companies like DaimlerChrysler can now be more selective about where they will locate investment. This makes companies like DaimlerChrysler more sensitive than ever to state tax systems. This sensitivity to tax policy provides the opportunity for meaningful and beneficial tax competition among the States for jobs and investment. *See* J. William Harden and William H. Hoyt, *Do States Choose Their Mix of Taxes to Minimize Employment Losses?*, 56 NAT. TAX J. 7, 8 (2003) (reporting scholarly consensus that state taxes impact employment levels). The Sixth Circuit's decision is leading to considerable confusion in the States as to what is permissible. This case presents an opportunity for the Court to articulate precisely what limits the Commerce Clause places on the States' ability to structure their tax systems "to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336.

### A. This Court's "tax neutrality" formulation is misunderstood.

In their complaint, respondents challenged Ohio's franchise tax credit on the ground that it discriminated against interstate commerce by inducing DaimlerChrysler to locate a new automobile manufacturing plant in Ohio rather than another State. *See* Compl. ¶¶21, 39. In complaining of

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[2] The Sixth Circuit panel did not explicitly adopt respondent's "economic effect" reasoning, but it did rule for respondents after recounting the arguments of both sides in the case.

the effect of Ohio's tax incentive, respondents seized on statements by this Court that suggest that "tax neutrality" is required under the Commerce Clause.

It is true that this Court has, on occasion, used expansive "tax neutrality" language in articulating Commerce Clause limitations. For example, *Boston Stock Exchange* struck down a New York stock transfer tax that levied higher tax rates on stock transfers that utilized out-of-state, as opposed to in-state, brokers on the ground that the challenged tax exemption "foreclose[d] tax-neutral decisions." 429 U.S. at 331. Elsewhere, this Court has also indicated that a state tax scheme is unconstitutional if it "forecloses tax-neutral decisions." *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388, 406 (1984).

Even recently, this Court has spoken in terms of tax neutrality. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994), the Court stated that a tax is unconstitutional if it "neutraliz[es] the advantage possessed by lower cost out-of-state producers . . . ." In *American Trucking Associations, Inc. v. Michigan Public Service Comm'n*, 545 U.S. ___, 125 S.Ct. 2419, 2423 (2005), the Court commented that "[n]othing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause."

These references to "tax neutrality" have caused lower courts to struggle with articulating applicable Commerce Clause standards. Some courts have suggested a standard under which any tax difference that affects behavior, in any way, is *per se* unconstitutional. *See, e.g., PPG Industries, Inc. v. Commonwealth Board of Finance and Revenue*, 790 A.2d 252, 259–60 (Pa. 1999) (holding an exemption unconstitutional that "affords preferential treatment to corporations that engage in manufacturing activities in the Commonwealth"). Yet despite the sweeping ramifications

suggested by the *PPG Industries* court's use of "tax neutrality" rhetoric, the case seems to have been decided on a narrow basis—PPG Industries' tax liability would have actually increased if it had made an investment outside Pennsylvania, just as the liability of the taxpayer in *Westinghouse* would have increased if it had exported goods from a state other than New York.

Other courts have more explicitly limited the sweeping "tax neutrality" rhetoric. *See, e.g., Smith v. New Hampshire Department of Revenue Administration* , 692 A.2d 486, 497 (N.H. 1997) ("[S]tate statutes may not constitutionally encourage the development of local industry by means of taxing measures that impose greater burdens on economic activities taking place outside the State than would be placed on similar activities within the State."); *R.J. Reynolds Tobacco Co. v. City of New York Department of Finance*, 169 Misc.2d 674, 686 (N.Y.S. 1995) ("Whenever a municipality attempts to foster in-state economic growth by burdening out-of-state interests, these measures constitute economic protectionism. Economic protectionism, which is flatly prohibited by the Commerce Clause, cannot be used to justify these otherwise invalid ordinances.") (internal citations omitted); *Aurora Corp. of Illinois v. Tully*, 457 N.E.2d 735, 739 (N.Y. 1983) ("[W]here, as here, a statute creates an advantage for New York businesses while imposing a burden on foreign corporations, tax-neutral decisions as to where to incorporate or do business are foreclosed and the resulting discriminatory burden on interstate commerce requires that the statute be declared invalid."). *See also Polychrome International Corp. v. Krigger*, 5 F.3d 1522, 1542 (3rd Cir. 1993) ("Under this reasoning [from *Boston Stock Exchange*], states can impose taxes on interstate commerce to create equality between in-state and out-of-state transactions—to make the choice between in-state and out-of-state commerce

tax neutral. When a tax equalizes burdens on interstate and intrastate commerce, the tax is ... constitutionally valid ....")

In the decision below, the Sixth Circuit did not explicitly limit or define the "tax neutrality" rhetoric. *Cuno*, 386 F.3d at 744. Thus, if left undisturbed, other courts may take the "tax neutrality" standard literally. Yet if "tax neutrality" were the rule—particularly as understood by economists—then any state tax system whose economic impact is to encourage investment in-state will run afoul of the Commerce Clause. Indeed, if taken literally, this would strike at the very heart of state tax sovereignty and require state tax conformity. Accordingly, "tax neutrality" cannot be the rule.

**B. What economists mean by tax neutrality.**

Economists define a neutral tax system as one that will extract needed tax revenues in a manner that does the least possible damage to economic growth and in a way that does not distort investment decisions. "A major goal of tax reform is to make our tax system more 'neutral' so that it exerts less influence on our economic choices. The economy almost always benefits when people make decisions based on the economic merits of the alternatives rather than on their tax consequences." *See* Joel Slemrod & Jon Bakija, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 131 (3d ed. 2004).

Tax neutrality is a lofty and worthy tax policy goal. Unfortunately, it is a goal that is virtually unattainable, though other goals of neutrality can still be maintained:

> The only tax system that is perfectly 'neutral' ... is a lump-sum tax because in this case *no* decision you make has any impact on your tax bill, so taxes cause no disincentive effects at all. The kind of neutrality

> that tax reformers strive for is less ambitious but still important—making sure that tax rates do not differ across various types of consumption and investment.

*Id.* Evaluating state tax systems for neutrality is tricky. For instance, there are at least two ways to consider tax neutrality in the income tax system of hypothetical state 'A.' The first, and most agreed upon approach, is to evaluate the neutrality of state A's income tax system in isolation (or, intrastate neutrality). If A's income tax system were neutral in isolation, it would tax all income at one rate and would provide no special credits or deductions beyond, perhaps, ordinary and necessary business expenses. This system is neutral because tax rates would not "differ across various types of consumption and investment." *Id.* Investor 'Z' would not be encouraged by state A's tax code to invest in manufacturing instead of retailing, for instance, because return on investment from retailing and manufacturing would be taxed at the same rate.

Intrastate neutrality is disturbed when a state creates tax incentives for certain behaviors. For instance, if state A adopted an investment tax credit like Ohio's, Investor Z would now be tempted to invest in capital intensive industries since those activities would generate a tax credit. Investors will artificially engage in more capital investment solely because of the tax benefits and not the underlying economic conditions. Tax credits for day care, deductions for charitable giving, and punitive taxes on tobacco are other examples of tax laws that upset intrastate neutrality because they distort behavior.

The second (and more controversial) way to consider the neutrality of state A's income tax system is to compare it to the system in other States (or, interstate neutrality). State A can have a perfectly neutral intrastate tax system that is nonetheless decidedly distortionary in an interstate context.

Even though state A is neutral to investor Z's decision to invest in retailing or manufacturing in state A, Z might be able to get a higher after-tax rate of return by investing in state B, which has lower taxes (either as a result of tax credits, lower tax rates, or favorable apportionment laws). If Z invests in state A or state B solely because of differences in either state's tax system, economists would call that distortion. *See* Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 900 (1992) ("As an economic matter...it is optimal that the tax levied on a given amount of profit or a given taxpayer be invariant with regard to where property or persons are located.").

Even if states A and B conformed their income tax bases but maintained different rates, distortion would still remain. In this case, differential rates would lead to different after-tax rate of returns on investment, depending on where Z chooses to locate its investment. *Id.* at 910 ("For example, assume that North Dakota has a ten percent flat rate income tax on residents and South Dakota has a five percent flat rate income tax on residents. All else being equal, residing in South Dakota is tax-favored relative to residing in North Dakota. Or assume that North Dakota taxes real property while South Dakota taxes sales. Now the locational biases favor owning real property in South Dakota and making sales in North Dakota.").

The only way the interstate tax system can attain true economic tax neutrality is for the States to conform their tax systems and levy identical taxes on an identical base with identical rates. *See* Shaviro, 90 MICH. L. REV. at 910 (locational neutrality unattainable in a system with separate tax jurisdictions). In our federal system, there are 50 states,

over 3,100 counties,[3] over 18,000 cities,[4] and over 16,000 school districts.[5] Many of these jurisdictions have the authority to levy income, sales, and property taxes (or some combination of all three). And yet, economists would only say that we had achieved pure interstate neutrality if all these tax jurisdictions chose the same mix of taxes and levied each tax on the same base at the same rate.[6] Interstate tax distortion can only be cured by resorting to respondents' demand for tax conformity among these 37,000 separate tax jurisdictions.

### C. The Commerce Clause does not require tax neutrality.

This Court has never interpreted the Commerce Clause to require state tax conformity. In fact, on numerous occasions this Court has said precisely the opposite. *See Trinova Corporation v. Michigan Department of Treasury*, 498 U.S. 358, 385 (1991) ("It is a laudatory goal in the design of a tax

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[3] United States Geological Survey, *Welcome to the USGS: How many counties are there in the United States?*, *at* http://interactive2.usgs.gov/faq/list_faq_by_category/get_answer.asp?id=785 (last accessed Nov. 9, 2005).

[4] National League of Cities, *About the National League of Cities*, *at* http://www.nlc.org/Inside%5FNLC/About%5FNLC (last accessed Nov. 9, 2005).

[5] National Center for Education Statistics, *Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States, 1999-2000*, *at* http://nces.ed.gov/pubs2001/100_largest/discussion.asp#tableA (last accessed Nov. 9, 2005).

[6] Of course, even in a perfectly harmonized state tax system, business location decisions would still be distorted by different legal regimes, regulatory policies, access to ports, weather, and a host of other factors. *See, e.g.*, Enrich, 110 HARV. L. REV. at 463 ("[E]conomic decisions are ... influenced by wide range of governmental policies, such as levels of services, intensity of regulation, and prevailing tax burdens ...").

system to promote investment that will provide jobs and prosperity to the citizens of the taxing State."); *see also West Lynn Creamery*, 512 U.S. at 199 n.15 (approving state provisions that create "an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes"); Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 448 (1997) (affirming that state competition affirms the goals behind the Commerce Clause). This Court has always approved of state tax sovereignty and interstate tax competition, and has never required that these principles yield to interstate tax neutrality.

And yet, adopting respondents' view of tax neutrality would make it very difficult, if not impossible, for States to create a competitive business tax climate. It would also open the doors of state and federal courts to lawsuits concerning the propriety of a host of measures that encourage investment. Low corporate tax rates, favorable apportionment formulas, and targeted tax credits are among the many differences in state tax systems which certainly impact where a corporation chooses to invest.

For this reason, commentators across the spectrum have argued that tax neutrality cannot be the Commerce Clause standard for discrimination. *See, e.g.*, Edward Zelinsky, *Restoring Lost Politics to the Commerce Clause*, 29 OHIO N.U.L. REV. 29, 48 (2002) (arguing that the distortion test as articulated by respondents' counsel does not satisfactorily distinguish between discriminatory and nondiscriminatory taxation); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 804 (1996) ("The astonishing implications of a literalistic reading of the Court's pronouncements [on neutrality] give us pause."); Shaviro, 90 MICH. L. REV. at 975 (arguing for a narrower principles than

distortion in our federalist system); Phillip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 931 (1986) ("[T]he Court's emphasis on the foreclosure of tax neutral decisions in *Boston Stock Exchange* creates complex problems.") (emphasis added).

Substituting distortion for a discrimination test would also eschew the sensitive, case by case analysis this Court has favored under the dormant Commerce Clause.

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case.

*Boston Stock Exch.*, 429 U.S. at 329. A distortion test would replace this Court's favored approach with a *per se* rule against any state tax provision that distorted business decision-making. Indeed, why would the courts stop with state tax provisions, if other state regulatory schemes also distort business investment decisions?[7]

Finally, the Constitution clearly contemplates a great deal of state sovereignty in the design of tax systems. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 181 (1980) (discussing the wide latitude States have in their taxing powers); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959) (affirming that States have a wide degree of discretion in their taxing powers); *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 425 (1819) ("That the power of taxation is one of vital

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[7] *See* Enrich, 110 HARVARD L. REV. at 453-58.

importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments—are truths which have never been denied."). Tax competition is a function of this sovereignty, as some States will choose to create a low-tax environment and others will choose to maintain higher levels of taxes and public services. A true economic distortion test—like that urged on this Court by respondents—would forbid States from using their tax system to promote investment and ultimately require conformity and harmonization in state tax systems.

### D. At most, the Commerce Clause requires competitive neutrality.

While the Commerce Clause cannot require economic tax neutrality in state tax systems—at least, not if the States are going to retain their sovereign tax powers—it does require competitive neutrality. The principle of competitive neutrality, as opposed to economic tax neutrality, can be seen in three cases decided by this Court.

In all three cases, the taxpayer was subject to the State's tax jurisdiction based on activities other than those favored by the State's tax scheme at issue in the case. In *Boston Stock Exchange*, taxpayers were subject to the New York stock transfer tax based on the transfer of stocks in New York; the challenged provision of the tax was an amendment that provided a reduced rate for only those transfers that utilized a New York-based broker. 429 U.S. at 317. In *Westinghouse*, the taxpayer was subject to franchise tax in New York based on doing business in New York; the challenged provision was a tax credit for exports made from a place of business in New York, calculated by comparing exports from New York with exports from other States. 466 U.S. at 393. In *Maryland v. Louisiana*, taxpayers were

subject to first-use tax in Louisiana because they shipped oil and gas extracted from the Outer Continental Shelf (OCS) through Louisiana; the challenged provision provided a credit against the first-use tax if the gas was consumed or used in Louisiana or if the taxpayer was engaged in severance-tax-liability-generating activities in Louisiana. 451 U.S. 725, 732-33 (1981).

In these three cases, the States did two things wrong. First, in *Boston Stock Exchange* and *Maryland v. Louisiana*, the States essentially exploited a monopoly (or oligopoly) position to extract higher tax burdens from taxpayers who also conducted out-of-state activities. 429 U.S. at 328, n.10 ("While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State."); 451 U.S. at 729-30 ("It is estimated that 98% of the OCS gas processed in Louisiana is eventually sold to out-of-state consumers with the 2% remainder consumed within Louisiana.").

Second, in *Westinghouse*, New York forced a taxpayer to pay higher taxes as out-of-state exporting activity increased relative to in-state exporting activity. 466 U.S. at 400. The New York tax directly penalized a New York taxpayer that engaged in more out-of-state activity relative to in-state activity, encouraging a New York taxpayer to engage in more New York activity to lower its tax burden.

These concerns are not in issue in this case. Unlike New York (with respect to stock transfers) or Louisiana (with respect to certain natural resources), Ohio does not have a monopoly or oligopoly position with regard to the type of business activity that is subject to its general franchise tax. Accordingly, Ohio was simply not in a position to effectively coerce DaimlerChrysler to further invest in the State. Moreover, unlike New York (with respect to the credit at

issue in *Westinghouse*), the Ohio credit does not increase a company's tax liability as a result of investing out-of-state.

Indeed, the tax schemes in *Boston Stock Exchange*, *Westinghouse*, and *Maryland v. Louisiana* were tariff-like; the Ohio investment tax credit is not. True, Ohio's investment tax credit does affect business investment location decisions, just like any favorable tax provision such as lower rates or favorable apportionment formulas. But it does not do so through tariff-like coercion or punishment of out-of-state activity. Ohio's investment tax credit is not economically neutral, but it is competitively neutral, which is sufficient to satisfy the Commerce Clause inquiry.

It is likely that, to the extent Ohio's investment tax credit gives some taxpayers benefits by burdening others, the burden is borne by Ohio taxpayers who do not invest in capital and machinery at all—not those who choose to invest in interstate commerce. This is certainly a case of intrastate discrimination but the Commerce Clause is only concerned with interstate discrimination. In fact, respondents' state equal protection claim gives them adequate grounds on which to challenge Ohio's investment tax credit if they have been injured by a discriminatory intrastate shift in their Ohio tax burden.

### E. This Court should clarify that the Commerce Clause does not require "tax neutrality."

This Court should use this case to clarify its tax neutrality language. In particular, States and taxpayers need guidance to ensure that tax programs that encourage economic investment, such as low tax rates, single sales factor apportionment, and Ohio's investment tax credit, do not discriminate against interstate commerce even though they encourage taxpayers to locate investment in Ohio. This Court should reject the arguments offered by respondents,

accepted by the Sixth Circuit, that tax provisions discriminate against interstate commerce simply because they encourage intrastate economic investment. *See Cuno*, 386 F.3d at 745 (summarizing respondents' argument as "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and...the result is to hinder free trade among the states.").

Specifically, this Court should explicitly declare that the States are free to offer tax benefits for intrastate investment and deny those benefits for interstate investment. These types of laws encourage labor and capital mobility and honor the original impetus for the Commerce Clause which was to create a national, integrated market. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 596 ("We have often said that the purpose of our negative Commerce Clause jurisprudence is to create a national market."). This Court should not, as affirming the Sixth Circuit would do, require that any encouragement given to Ohio taxpayers should also equally apply to those Ohio taxpayers that invest in another State. *See Hughes v. Alexandria Scrap Corp*, 426 U.S. 794, 815-16 (1976) (Stevens, J., concurring) ("[T]he Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business...[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.").

Furthermore, this Court should take this opportunity to clarify that state tax policy decisions do not burden interstate commerce merely because those decisions cause differences among the States that may affect decision making. The Commerce Clause prohibits economic protectionism, not fair encouragement of intrastate investment. *See Boston Stock*

*Exchange*, 429 U.S. at 336-37 (stating that States are allowed to structure tax system to foster intrastate growth and compete for investment).

Indeed, a classic treatise on political economy finds that these differences are a good thing for our market-based system. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) ("The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods."). Consistent with this, the theme of this Court's decisions (aside from the "tax neutrality" rhetoric) is that the States are free to compete for a share of interstate investment. Accordingly, this Court should explicitly declare that the States are free to compete and that "tax neutrality" is not the constitutional standard.

## CONCLUSION

For the foregoing reasons, this Court should rule that respondents do not satisfy Article III or prudential standing requirements and should clarify that economic tax neutrality is not the standard imposed by the Commerce Clause.

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IN THE

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
*Petitioners*,

v.

CHARLOTTE CUNO, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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# MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioners. Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for respondents did not respond to requests for consent, thereby necessitating this motion.

WLF is a nonprofit, nonpartisan public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF engages in litigation and participates in administrative proceedings to defend free enterprise, individual rights, and a balanced civil justice system. To that end, WLF has frequently appeared as *amicus* in this Court

and lower courts to address issues of importance to free enterprise.

WLF is concerned that the decision of the Sixth Circuit, if not reversed, would undermine long-established and non-discriminatory methods employed by the States to create a favorable climate for business and thereby to promote business investment.

WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

Respectfully submitted,

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## INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, nonpartisan public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] The interests of *amicus* are set out in the motion for leave to file this brief.

## SUMMARY OF ARGUMENT

The States have long granted incentives through prospective tax credits to attract new investment in order to foster and promote economic growth in the state. The tax credit involved herein, one of many such State programs, should be upheld as constitutional. The scope of the dormant Commerce Clause should not be expanded so far as to prohibit a state's legitimate interests in stimulating economic growth in its state. The tax credit offered by Ohio neither involved the type of protectionist tax regime which has frequently been the object of dormant Commerce Clause invalidation nor did it in any way penalize a taxpayer for initiating, conducting or expanding activities outside Ohio. Finally, the decision should be reversed and the case should be dismissed on the basis that the plaintiffs in this case lack proper standing to challenge the tax policies adopted by Ohio.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

## ARGUMENT

### I. The Scope of the Dormant Commerce Clause Should Not be Expanded to Invalidate Ohio's Investment Credit Because It is Not Protectionist and Does Not Penalize Out-of-State Activities.

This Court has not used the Commerce Clause to invalidate tax programs involving mere economic competition for new investment on a level playing field. Most of the cases where this Court and others have invalidated state tax regimes under the dormant Commerce Clause have either (i) involved significant elements of protectionism, whereby a state sought to tax out of state products more heavily (*see, e.g., Bacchus Imports v. Dias*, 429 U.S. 318 (1977)) or (ii) sought to exploit some unique geographic location (*see, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981)) or other inherent advantage (*see, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977)) to coerce taxpayers to direct more of their business to that state. The programs in the first type of case easily fit into a "protectionist" category and the programs in the latter type of cases were in effect tying the unique advantage enjoyed by that state (whether it was location adjacent to offshore gas wells or location of most of the stock transfer agents in the country) to additional business activity.

There is another type of tax regime that this Court has struck down under the dormant Commerce Clause. That type of tax regime had the effect of increasing in-state taxation if the taxpayer increased its investment out of state. That type of tax regime was found invalid in *Westinghouse Electric v. Tully*, 466 U.S. 388 (1984). That type of tax regime is not involved in this case. Were DaimlerChrysler to locate additional facilities in Michigan or to run extra shifts at some or all of its Michigan factories to increase its output from

Michigan plants, such increased activity would in no way reduce the tax credit granted by Ohio.

Until the decision by the Sixth Circuit below, all of the cases where the dormant Commerce Clause invalidated a state tax provision involved a regime that in some fashion penalized activities in another state. That element is simply missing in this case. This Court has often stated the principle that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry" and that it does not prevent a state from competing with other States for a share of interstate commerce so long as it does not discriminatorily tax the products manufactured or the business operations performed in other states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-7 (1977). The investment credit offered by Ohio completely satisfies these criteria.

## II. Judicial Restraint is Particularly Appropriate Where, As Here, The Type of Program Involved is Ubiquitous and Businesses and States Have Invested Heavily In Reliance on Existing Law.

Judicial restraint is particularly appropriate in this area where (i) so many states have built their economic development programs around incentives designed to comply with well-established understanding of the scope of the dormant Commerce Clause and (ii) so many businesses have invested so much capital and created so many jobs also in reliance on the long-established boundaries of the dormant Commerce Clause. Billions of dollars have been invested on the premise of validity of state tax incentives that are not protectionist and do not penalize out of state activities. Virtually every state that imposes an income tax currently offers tax incentives for new investment, creation of new jobs, and/or conduct of qualifying research and development

activity in that state. *See* Appendix A hereto for a partial representative listing of state statutes offering incentives of this kind.

The ubiquity of state tax credits similar to the credit offered by Ohio provides sound reasons for judicial restraint in this area. Untold business decisions have been made on the basis of the legitimacy of this type of incentive for economic development; financial statements of countless companies will have to be restated if these credits are retroactively invalidated; indeed in some cases these credits should enjoy contractual protection and consequently should be immune from retroactive invalidation.

Furthermore, the type of investment incentive involved herein is so widespread that the programs must necessarily come to the notice of Congress if objectionable. If these types of credits are to be invalidated, the decision should be made by Congress which, after investigating and holding hearings to understand the advantages and disadvantages of allowing such credits, can finely craft an appropriate rule. Should it decide which credits to allow and which credits to restrict or prohibit, Congress can also adopt carefully crafted transition rules, deciding in which cases, if any, the economic premises underlying the business decisions already made should be disturbed. The legislative process is well-equipped to craft that type of prospective rule with transition relief.

The Sixth Circuit mischaracterized the Ohio credit in one important fashion. It described the credit as available to offset DaimlerChrysler's existing tax liabilities. Pet. App. 6a. The credit is not retroactive and cannot be carried back (Ohio Rev. Code 5733.33(D)); hence it cannot offset existing tax liabilities. It is true that the credit could offset tax on income from DaimlerChrysler's existing facilities in Ohio, provided DaimlerChrysler is profitable in the three years following the grant of the credit and provided that the new

facilities of DaimlerChrysler do not cause sufficient additional income to be apportioned to Ohio fully to utilize the credit. Neither of these propositions can be known with certainty at the time that DaimlerChrysler makes the decision to build its new facility, and hence to describe the grant of the credit as "coercing" taxpayers to invest in Ohio is seriously to overstate the effect of the credit. It more fairly could be characterized as one incentive offered by Ohio in its effort to compete for its fair share of interstate business.

In a different tax area, this Court wisely deferred to Congress largely to resolve the competing interests of states' legitimate interest in collecting their sales/use taxes with the established expectations of merchants located out of state. In *Quill v. North Dakota*, 504 U.S. 298, 312 (1992), the Court built upon precedent but also drew an important distinction between Commerce Clause and Due Process jurisdiction. The Court clarified that even when jurisdiction to tax was present under the Due Process Clause, the Commerce Clause imposed an additional and distinct set of criteria, a set that could be legislatively regulated by Congress. Based on established expectations from earlier cases, the Court ruled that an out-of-state vendor had to have a physical presence in the state before the state could require it to collect sales/use tax from in state customers. The Court wisely minimized its involvement in ruling on state tax nexus issues, while disposing of the case in a manner that satisfied historic expectations and at the same time making it clear that Congress could change the rules if and when it wished. It is respectfully submitted that the Supreme Court should adopt a similar approach here. It should not, under the rubric of the *dormant* Commerce Clause, embroil itself in adjudicating a whole new class of state tax incentives, which for decades have been viewed as constitutionally permissible.

## III. The Plaintiffs Lack Standing to Challenge State Tax Policies Not Affecting Them in Some Particularized and Specific Way.

Citizens unhappy with the tax policies of their jurisdiction have recourse at the ballot box, and when their objection to a state tax program is purely on policy, political or philosophical grounds, the doors to the courthouse should generally be closed to them. Persons whose only complaint is that their own taxes might increase as members of the public because a state has chosen to tax some other business or activity more lightly should not be allowed to burden the courts with their disagreements over state government policies. To bring an action to challenge a tax policy, plaintiffs should be required to have some more particularized injury, to show that their own taxes went up more so than just those of the public in general, to show that they are being discriminated against, or to show that the tax policy being challenged otherwise disadvantages them in a particular way.

Many cases have acknowledged that collection of tax revenues is vital to a sovereign, and two acts — the Anti Injunction Act (*see* 26 U.S.C. § 7421) and the Tax Injunction Act (*see* 28 U.S.C. § 1341) — codify this principle for both federal and state taxes. Neither of those acts is involved in this case as the collection of a tax is not involved. A sovereign, however, should collect that revenue pursuant to democratically-approved policies without having to defend its policies and methods from any and all citizens unhappy with the policies it is following. Hence suits by members of the public in general who have no particularized or specific injury should be disfavored. State tax officials should not be diverted from collecting revenues by having to defend their policies in court against challenges by anyone who is not aggrieved in some particularized manner and does not

complain that he overpaid his own taxes, but rather just disagrees with the wisdom of the state's policies.

The Court has long followed the doctrine that a plaintiff must have some particularized injury and not just "generalized grievances more appropriately addressed in the representative branches . . ." *Allen v. Wright*, 468 U.S. 737, 751 (1984), *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 474-5 (1982). "The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. [*Valley Forge*, *supra* at 472]." *Allen v. Wright* at 751. Here respondents have not and cannot allege personal injury, and for that reason their complaint should be dismissed. Particularly where the complaint is not from a taxpayer alleging that it was harmed by economic protectionism or discriminated against because it was an out of state company, the necessity of adequate standing provides the appropriate way to dispose of what essentially are philosophical or political issues not involving discrimination and consequently not properly implicating the dormant Commerce Clause.

This standing rule is particularly appropriate in cases such as this involving the dormant Commerce Clause, where the outlines are inherently somewhat amorphous. Unlike positive Constitutional provisions such as the Establishment Clause where the Constitution clearly prohibits a range of specific activities, the dormant Commerce Clause is considerably more susceptible to members of the public seeking to invoke it simply because they disagree with the policies being followed by a particular state. For example, a different rate of income tax for banks, or a different rate of tax on food from other tangible personal property, or a different rate of property tax for farms might arguably be a

basis for a challenge of a state's policies on dormant Commerce Clause grounds. Matters such as these should be left to the legislature, and if sufficient members of the public are unhappy with the policies, the appropriate recourse is to be found at the ballot box, not at the courthouse. Hence, particularly for challenges to tax policies on dormant Commerce Clause grounds, the plaintiff should be required to allege some particularized and specific basis of injury.

## CONCLUSION

For the foregoing reasons, the Washington Legal Foundation respectfully urges this Court to decide that (1) the economic incentives granted by Ohio in the form of investment tax credits that can be used prospectively do not violate the dormant Commerce Clause and (2) the Plaintiffs herein lacked proper standing to bring an action challenging Ohio's tax policies on grounds that it was inconsistent with the dormant Commerce Clause.

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December 5, 2005

## APPENDIX A

| State | Credit/Incentive Type | Reference |
|---|---|---|
| Alabama | "Alabama Enterprise Zone Act" Incentive Tax Credits | Ala. Code § 41-23-20 et. seq.; § 40-18-190 et seq. |
| Alaska | Mineral Mining Exploration Incentive Tax Credit | Alaska Stat. § 27.30.010 et seq. |
| | Oil and Gas Exploration Incentive Tax Credit | Alaska Stat. § 38.05.180; Alaska Stat. § 41.09.010 et seq. |
| Arizona | Enterprise Zone Employment Incentive Tax Credit | Ariz. Rev. Stat. Ann. § 41-1521 et seq.; Ariz. Rev. Stat. Ann. § 43-1161 |
| | Arizona Research and Development Incentive Tax Credit | Ariz. Rev. Stat. Ann. § 43-1168 |
| Arkansas | Biotechnology Development and Training Incentive Tax Credit | Ark. Code Ann. § 2-8-101 et seq. |
| | "Emerging Technology Development Act" Incentive Tax Credit | Ark. Code Ann. § 15-4-2103 et seq. |

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| California | California Research and Development Incentive Tax Credit | Cal. Rev. & Tax. Code § 23609 |
| | Enterprise Zone Hiring Incentive Tax Credit | Cal. Rev. & Tax. Code § 23622.7 |
| Colorado | Enterprise Zone Investment Incentive Tax Credits | Colo. Rev. Stat. § 39-30-103 et seq. |
| Connecticut | Connecticut Research and Experimental Expenditures Incentive Tax Credit | Conn. Gen. Stat. § 12-217j |
| | Enterprise Zone Incentive Tax Credits | Conn. Gen. Stat. §§ 12-217e, 12-217v |
| Delaware | Delaware Research and Development Incentive Tax Credit | Del. Code Ann. tit. 30, § 2070 et seq. |
| District of Columbia | "Economic Development Zone Incentives Act" Tax Credits | D.C. Code §§ 6-1501, 6-1504, 47-1807.04, 47-1808.07 |
| Florida | Enterprise Zone Incentive Tax Credits | Fla. Stat. § 290.007 |
| Georgia | Georgia Research and Development Incentive Tax Credit | Ga. Code Ann. § 48-7-40.12 |
| Hawaii | High Technology Business Investment Incentive Tax Credit | Haw. Rev. Stat. § 325-110.9 |
| | Hawaii Research and Development Incentive Tax Credit | Haw. Rev. Stat. § 325-110.91 |

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|---|---|---|
| Idaho | Idaho Research and Development Incentive Tax Credit | Idaho Code Ann. § 63-3029G |
| | "The Idaho Corporate Headquarters Incentive Act of 2005" Tax Credits | Idaho Code Ann. § 63-2901 et seq. |
| Illinois | Illinois Research and Development Incentive Tax Credit | 35 Ill. Comp. Stat. 5/201(k) |
| | Enterprise Zone Investment and Hiring Incentives Tax Credits | 35 Ill. Comp. Stat. 5/201(f); 35 Ill. Comp. Stat. 5/201(g) |
| Indiana | Indiana Research and Development Incentive Tax Credit | Ind. Code § 6-3.1-4-1 et seq. |
| Iowa | Iowa Research and Development Incentive Tax Credit | Iowa Code § 422.33(5) |
| | Enterprise Zone Incentives Tax Credits | Iowa Code § 15A.9; Iowa Code § 5E.191 et seq.; Iowa Code § 15E.232 |
| Kansas | Kansas Research and Development Incentive Tax Credit | Kan. Stat. Ann. § 79-32,182b |
| Kentucky | Kentucky Research Facilities Construction Incentive Tax Credit | Ky. Rev. Stat. Ann. § 141.395 |
| Louisiana | Louisiana Research and Development Incentive Tax Credit | La. Rev. Stat. Ann. § 47:6015 |

| | | |
|---|---|---|
| Maine | Maine Research and Development Incentive Tax Credit | Me. Rev. Stat. Ann. tit. 36, § 5219-K |
| Maryland | Maryland Research and Development Incentive Tax Credit | Md. Code Ann. Tax-Gen. § 10-721 |
| | Qualified Business Expansion and Hiring Incentive Tax Credit | Md. Code Ann. Tax-Gen. § 10-704.8; Md. Code Ann. Tax-Prop. § 9-230 |
| Massachusetts | Massachusetts Research and Development Incentive Tax Credit | Mass. Gen. Laws ch. 63, § 38M |
| Michigan | Michigan Pharmaceutical Research Incentive Tax Credit | Mich. Comp. Laws § 208.39f |
| | Renaissance Zone Incentive Tax Credits | Mich. Comp. Laws §§ 125.2686, 208.39b |
| Minnesota | Minnesota Research and Development Incentive Tax Credit | Minn. Stat. § 290.068 |
| Mississippi | Manufacturers', Distributors' and Merchants' Qualified Property Incentive Tax Credit | Miss. Code Ann. § 27-7-22.5 |
| | "Mississippi Broadband Technology Development Act" Qualifying Equipment Investment Incentive Tax Credit | Miss. Code Ann. § 57-87-5 |

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|---|---|---|
| Missouri | Expanded Business Facilities Incentive Tax Credit | Mo. Rev. Stat. §§ 135.100, 135.150, 135.155 |
| | Missouri Research and Development Incentive Tax Credit | Mo. Rev. Stat. § 620.1039 |
| Montana | Montana Research and Development Incentive Tax Credit | Mont. Code Ann. § 15-31-150(1) |
| Nebraska | Enterprise Zone Incentive Tax Credits | Neb. Rev. Stat. § 77-2734.03 |
| New Hampshire | Community Reinvestment and Opportunity Zone Incentive Tax Credits | N.H. Rev. Stat. Ann. § 162-N:1 et seq.; N.H. Rev. Stat. Ann. § 77-A:5, XII; N.H. Rev. Stat. Ann. § 77-E:3-a |
| New Jersey | New Jersey Research and Development Incentive Tax Credit | N.J. Stat. Ann. § 54:10A-5.24 |
| New Mexico | Enterprise Zone Incentive Tax Credits | N.M. Stat. § 7-2A-15 (1978) |
| New York | Qualified Emerging Technology Company Employment Incentive Tax Credit | N.Y. Tax Law § 210(12-E) |
| North Carolina | "William S. Lee Quality Jobs and Business Expansion Act" Incentive Tax Credits | N.C. Gen. Stat. § 105-129.2 et seq. |
| North Dakota | North Dakota Research and Development Incentive Tax Credit | N.D. Cent. Code § 57-38-30.5 |

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|---|---|---|
| Oklahoma | Enterprise Zone Incentive Tax Credits | Okla. Stat. 62 § 690.4; Okla. Stat. 68 § 2357.81 |
| Oregon | Oregon Research and Development Incentive Tax Credit | Or. Rev. Stat. § 317.152 |
| | Enterprise Zone Incentive Tax Credits | Or. Rev. Stat. § 285C.406; Or. Rev. Stat. § 285C.400; Or. Rev. Stat. § 317.124; Or. Rev. Stat. § 315.507 |
| Pennsylvania | Pennsylvania Research and Development Incentive Tax Credit | Pa. Stat. Ann. 72 § 8701-B et seq. |
| Rhode Island | Rhode Island Research and Development Incentive Tax Credit | R.I. Gen. Laws § 44-32-3 |
| South Carolina | South Carolina Research and Development Incentive Tax Credit | S.C. Code Ann. § 12-6-3415 |
| | Corporate Income Tax Moratorium For Job Creation | S.C. Code Ann. § 12-6-3365 |
| Tennessee | Jobs Creation Incentive Tax Credit | Tenn. Code Ann. § 67-4-2109(c)(2) |
| Texas | Texas Research and Development Incentive Tax Credit | Tex. Tax Code Ann. § 171.722 |
| | Jobs Creation Incentive Tax Credit | Tex. Tax Code Ann. § 171.751 et seq. |

| | | |
|---|---|---|
| Utah | Utah Research and Development Incentive Tax Credit | Utah Code Ann. § 59-7-612 |
| Vermont | Vermont Research and Development Incentive Tax Credit | Vt. Stat. Ann. tit. 32, § 5930w |
| Virginia | Virginia Research and Development Incentive Tax Credit | Va. Code Ann. § 58.1-439.14 |
| | Major Business Facility Jobs Creation Incentive Tax Credit | Va. Code Ann. § 58.1-439 |
| Washington | Job Training Incentive Tax Credit | Wash. Rev. Code § 82.04.4333 |
| | Washington Research and Development Incentive Tax Credit | Wash. Rev. Code § 82.04.4452 |
| West Virginia | West Virginia Research and Development Incentive Tax Credit | W. Va. Code § 11-13R-1 et seq. |
| Wisconsin | Wisconsin Research and Development Incentive Tax Credit | Wis. Stat. § 71.28 |
| | Development Zone Incentive Tax Credits | Wis. Stat. § 71.28(1dx) |

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v.

CHARLOTTE CUNO, et al.,

*Respondents.*

and

WILLIAM W. WILKINS,
Tax Commissioner etc., et al.,

*Petitioners,*

v.

CHARLOTTE CUNO, et al.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF AMICUS CURIAE WAYNE COUNTY, MICHIGAN, IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

Wayne County is the largest county in Michigan, with a population of over two million. It was once headquarters to all of "The Big Three." Petitioner DaimlerChrysler is headquartered in an adjacent county. Wayne County is still headquarters to Ford Motor Co. and General Motors Corp. Many of the Big Three manufacturing facilities, along with the facilities of Petitioner DaimlerChrysler Corp., are located in Wayne County, in part, because of tax incentives enacted by both the Michigan legislature and Wayne County government.

Wayne County, has the power to levy property taxes and the power to enact tax incentives like the incentives being challenged in this case. (Wayne County Charter, § 5.181). Not surprisingly, given Wayne County's prominence in the world's automotive and manufacturing history, it is the policy of Wayne County to capture and encourage industrial and economic growth.

Wayne County has a vital interest in assuring that disgruntled citizens, such as Respondents, not be allowed to use the courts to overrule the legislative and policy decisions of duly elected lawmakers. If the decision of the Sixth Circuit is allowed to stand in this case, persons from inside and outside the jurisdiction – regardless of injury or motive – will have the imprimatur of this Court to attack the self-governance principles inherent in a republican form of government. The separation of powers requires

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[1] Under Supreme Court Rule 37.6, amicus curiae state that no counsel for a party has written this brief in whole or in part, and no entity or person, other than the amicus curiae, has made a contribution to the preparation or submission of this brief.

that Respondents – and, indeed, all citizens – effect policy decisions through their elected officials, and not through the Court.[3]

## STATEMENT OF THE CASE

In 1998, Toledo, Ohio – which is only 20 miles from the southern border of Wayne County – and two local school districts provided a $281 million tax incentive to DaimlerChrylser to encourage it to continue its manufacturing presence in those communities. The Ohio statutory scheme permitting the investment tax credit was enacted "to encourage industrial investment and development in Ohio, particularly in economically troubled areas." *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 1196, 1198, 1201 (2001). The Ohio economy like Michigan's is heavily reliant on the manufacturing and automobile industries, and has suffered through an exodus of jobs.

Respondents, plaintiffs below, filed a law suit challenging the constitutionality of the incentives under the Commerce Clause and the Equal Protection Clause of the United States Constitution. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Respondents do not allege any specific injury as a result of the Ohio investment tax credit statute but, rather, seek to "free all the states from the necessity of engaging in escalating competition over incentives that deprives all of them of needed revenues, while gaining a

[3] *See DeShaney v. Winnebago Co. Dep't of Social Services*, 489 U.S. 189, 203 (1989).

meaningful competitive edge for none." (Op. Cert. at 6). Respondents further argue that investment tax credits are bad public policy (Op. Cert. at 6).

The United States District Court for the Northern District of Ohio found that the challenged statute's purpose "constitutes a legitimate state interest that clearly has a rational nexus" to the tax credit. *Id.* at 1201. The court found that "[n]otwithstanding Plaintiffs' innovative arguments" Ohio's investment tax credit does not violate the Commerce Clause. *Id.*

A panel of the United States Court of Appeals for the Sixth Circuit held that the investment tax credit statute (Ohio Rev. Code Ann. § 5733.33) is unconstitutional under the Dormant Commerce Clause of the United States Constitution because "the tax credit involves state regulation of interstate commerce through its power to tax" even though the investment tax credit "is equally available to in-state and out-of-state businesses." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743, 746 (6th Cir. 2004). The court did not address standing.

This Court granted certiorari and directed the parties to brief the following question: whether Respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005).

## SUMMARY OF ARGUMENT

### I

This Court does not sit as a "super-legislature" to second-guess the desirability of statutes. The states may,

"within extremely broad limits," experiment with different economic philosophies. Thus, even if this Court were to find Ohio's tax statutes unwise or ineffective, this Court is still obligated by the Constitution to tolerate what it may regard as a legislative mistake. Founded in 1796, before Michigan was admitted to the Union, amicus Wayne County's experience is that tax incentives are both effective and necessary. Wayne County maintains that it is good government to utilize tax resources for economic viability.

## II

Respondents lack standing to challenge the constitutionality of Ohio's tax incentive statutes because Respondents have not suffered an "injury in fact" as a result of those statutes nor is it likely that their alleged grievances would be redressed by a favorable decision of this Court.

## III

The Sixth Circuit has misapplied longstanding precedent in the area of interstate commerce, as the tax incentives provided by Ohio, and by jurisdictions like Wayne County do not constitute an undue burden on interstate commerce, in violation of the Dormant Commerce Clause.

## ARGUMENT

### I

### THIS COURT DOES NOT SIT AS A SUPER-LEGISLATURE DECIDING STATE POLICY, THUS, RESPONDENTS CANNOT INVOKE THIS COURT'S JURISDICTION TO IMPOSE POLICY ON THE STATES

The question before this Court is not whether the Ohio tax incentive statute is wise or unwise, desirable or undesirable. *James v. Strange*, 407 U.S. 128, 133 (1972). *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969). The question before this Court is not what economic philosophy Ohio should or should not embrace. *Id.* The question before this Court is not whether Ohio's statute is effective or ineffective. The sole question before this Court is whether the statute is constitutional. *James*, 407 U.S. at 133.

This Court has repeatedly held that it does not sit as "a super-legislative body." *Sniadach*, 395 U.S. at 339. *Day-Brite Lighting v. State of Missouri*, 342 U.S. 421, 423 (1952). But, rather, "state legislatures have constitutional authority to experiment with new techniques . . . [and] they may within extremely broad limits control practices within the business-labor field so long as specific constitutional prohibitions are not violated." *Id.* Indeed, this Court need not concur in those legislative policies to hold the enactments constitutional. *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952). Judicially this Court is obligated by the Constitution to tolerate what it may regard as a legislative mistake. *Id.* Misguided laws may nonetheless be constitutional. *James*, 407 U.S. at 133.

Thus, it is Respondents' considerable burden to prove, not that tax incentive statutes are unwise, but that they are unconstitutional. *Id.*

## A. Tax Incentives Are Vital to Wayne County's Economy

Wayne County is the largest county in the State of Michigan and the eleventh largest in the nation. It is comprised of 44 cities, including Detroit. It is historically, and culturally fused with the automobile industry and heavy manufacturing. There have been thoughtful efforts to diversify the economy by working to attract and develop business growth in high technology, service, tourism, entertainment, and health care industries. But Wayne County is the home of the automobile. Wayne County's citizens work in its factories, and Wayne County's economy rises and falls with the number of cars purchased by consumers.

For 30 years Wayne County's economy has been in serious decline. Its unemployment rate of six percent is the highest in the nation. A recent study conducted by the Initiative for a Competitive Inner City, indicates that Wayne County's largest city, Detroit, lost more jobs between 1995 and 2003 than any other large American city. Detroit has 400,000 fewer jobs today than it had in 1970.

As a result of these economic challenges, Wayne County and other similarly situated municipalities have needed to employ a strategy to assist the businesses that are already located in Wayne County and to attract new ones. One of those strategies is providing tax incentives to those businesses in return for job creation.

Michigan Public Act 198 of 1974 allows a 50 percent reduction in local property taxes to businesses for the renovation expansion, or new construction of manufacturing plants in Michigan. Wayne County is eligible to grant abatements under this statute, and has done so with success. Overall, this program has resulted in the creation of 500,000 new jobs and the creation of 1.3 million jobs throughout Michigan.

Michigan Public Act 328 of 1998 is targeted at "distressed" communities, abating all (100%) new personal property taxes in designated geographic areas. Wayne County has taken advantage of this for businesses within its boundaries.

Michigan Public Act 146 of 2000, known as the obsolete Property Rehabilitation Act, encourages the redevelopment of obsolete buildings by freezing taxes on the property for up to 12 years.

Tax Increment Finance Authority Districts have been established in Wayne County to capture and re-invest taxes for the development of projects such as Ford Field, home of the Detroit Lions, and the Detroit Tigers' Stadium known as Comerica Park. Both stadiums have created thousands of jobs in the county and metro region.

Other tax incentives have been employed with success by Wayne County, such as the "Brownfield" program which encourages the development of sites that are contraindicated. Up to $1 million in credits are available.

A newer program created by the state, called the Michigan Economic Growth Authority, provides tax incentives for development in the areas of high technology and research and development.

These programs are the life-blood of Wayne County's job retention efforts. Wayne County must be able to utilize these tools to survive in an increasingly tough economic climate.

Many business, which are automotive suppliers or automotive related, would prefer to be physically proximate to the auto companies based in Wayne County. Being close to the customer provides economies of scale for distribution and supply. But these suppliers and automotive related companies, which form the backbone of Wayne County's job base, will locate elsewhere if the overall cost of doing business is lower elsewhere. Taxes are not the only factor, but they are certainly a key factor.

The use of tax incentives to preserve Wayne County's job base is not an abstract economic theory, it is a means to assist County citizens from the crisis of losing a job, and the devastation that flows from it including lost homes, health care, and the ability to buy groceries.

Wayne County is, therefore, committed to utilizing these tax incentives as one effective tool in preserving its economic base and way of life.

There are a number of factors that a company takes into account when deciding whether doing business in a particular locale makes sense. Some of those factors include: the availability of workers; the opportunity to grow; the regulatory environment; competition; access to health care; location; and taxable costs of doing business. There are other important, non-bottom line factors which are considered, such as quality of life issues.

It is Wayne County's economic development experience that the taxable cost of doing business rates high on

the list, and must be addressed if Wayne County is to be competitive with other regions and the world market.

## II

## RESPONDENTS LACK STANDING TO CHALLENGE OHIO'S TAX CREDIT STATUTE BECAUSE RESPONDENTS' INJURIES ARE CONJECTURAL AND NOT LIKELY TO BE REDRESSED BY A FAVORABLE DECISION

The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. *Kowalski v. Tesmer*, 543 U.S. 125, ___, 125 S. Ct. 564, 567 (2004). The party invoking federal jurisdiction bears the burden of establishing that jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, since Respondents here invoked the jurisdiction of this Court, Respondents bear the burden of establishing that they have standing. *Id.*

### A. Respondents Lack Article III Standing

This Court has held that the "irreducible constitutional minimum" of standing contains three elements:

1. "Injury in fact" of a legally protected interest that is, concrete and particularized, actual or imminent, and not conjectural or hypothetical;

2. A causal connection between the injury and the challenged action, an injury which is not the result of the independent action of a third party; and

3. An injury that will likely, not speculatively, be redressed by a favorable decision of the court. U.S. Const art. III, § 1. *Lujan*, 504 U.S. at 560-561.

Here, Respondents cannot establish any of these required elements. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Comp. ¶¶ 2-6. The Ohio Respondents allege that, as a result of the tax credit, the revenues of their state have diminished and that the tax credit impermissibly and disproportionately shifts the tax burden to them. Comp. ¶¶ 22, 40, 42.

In a similar case, this Court refused to confer standing on state taxpayers, who alleged that a state statute governing mineral leases "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." This Court held that the taxpayers lacked standing because "even if the first part of the assertion were correct . . . it is pure speculation whether the lawsuit would result in any actual tax relief for respondents." *ASARCO v. Kadish*, 490 U.S. 605, 613, 614 (1989).

This Court went on to say, "[t]he possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is 'remote, fluctuating and uncertain' . . . and consequently the claimed injury is not 'likely to be redressed by a favorable decision.'" *Id.*

Like the taxpayers in *ASARCO*, the Ohio taxpayers, in the case before the Court today, lack standing because their lawsuit rests on conjecture and their claimed injury would not likely be redressed by a favorable decision. *Id.* Similarly, the Michigan Respondents' lawsuit rests on even greater speculation: that they lost "economic opportunity in the form of jobs" because of the Ohio tax credit. Comp.

¶ 42. The Michigan Respondents speculate that, had DaimlerChrysler not expanded in Ohio, it would have expanded in Michigan and given Respondents a chance at jobs. That speculation does not even come close to an "injury in fact," caused by the challenged tax credit, which would likely be redressed by a favorable decision.

### B. Respondents Lack Standing To Raise The Rights Of Others

An alternative threshold question of standing asks if Respondents have standing to raise the rights of others. *Kowalski*, 125 S. Ct. at 567. A party seeking third-party standing must show: first, that the party asserting the right has a "close" relationship with the person who possesses the right; and, second, that there is a "hindrance" to the possessor's ability to protect his own interest. *Id.* Here, Respondents have alleged no such cause of action or no such relationship.

Further, the right to complain that a state law discriminates in violation of the Commerce Clause belongs to those against whom the law discriminates. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n. 3 (1977). Here, Respondents lack third-party standing because they do not allege that the tax credit discriminates against them. *Id.*

## III

## THE SIXTH CIRCUIT HAS MISAPPLIED LONGSTANDING PRECEDENT IN THE AREA OF INTERSTATE COMMERCE, AS THE TAX INCENTIVES PROVIDED BY OHIO, AND BY JURISDICTIONS LIKE WAYNE COUNTY DO NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE, IN VIOLATION OF THE DORMANT COMMERCE CLAUSE

This Court has held that under the Federal Economic Clause, a state (and by extension a political subdivision thereof such as Wayne County) may enact its own philosophy towards business taxation. *Id.* In *Boston Stock Exchange,* this Court explained that, "Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a state may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no state may discriminatorily tax the products manufactured or the business operations performed in any other state." *Id.* at 336-337.

In *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), Justice Robert Jackson articulated the Court's position on state regulation and the national economy. For the Court, he wrote, "The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action. [Perhaps] even

more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the [Constitution]."

The "great silence" created by the Founding Fathers in the Commerce Clause, has long meant that the states, and municipalities like Wayne County, have great freedom to enact economic programs to benefit businesses within its boundaries, where Congress has not "spoken" in some pre-emptive fashion, so long as the economic program does not affirmatively discriminate against foreign corporations. This great silence has come to be known as the Dormant Commerce Clause theory.

The "Dormant Commerce Clause" theory has been used to strike down undue burdens on interstate commerce. But such a burden was not found in *Boston Stock Exchange* where tax incentives for intrastate benefits was applied.

In the case before the Court today, the Sixth Circuit cited *Boston Stock Exchange* but misapplied it by holding that Ohio's tax incentive was discriminatory.

On the contrary, Ohio, like Wayne County, and like other jurisdictions throughout the country, is constitutionally permitted to provide such tax incentives to businesses within its borders because it has not imposed a tax burden on products or business operations on a company in another state. Taxing discrimination in this sense would require some steps to actively hinder a company or product line in another state, while creating the intrastate advantage, and there is no evidence of that type of undue tax burden on out-of-state businesses in this case.

Significantly, the Sixth Circuit's decision is expressly contrary to the leading state law case in the Sixth Circuit, decided by the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W. 2d 182 (Mich. 1992). In the *Caterpillar* case, the Michigan Department of Treasury extended a capital acquisition deduction to Caterpillar and other qualifying businesses for personal property located within the state. Under this Michigan economic program, even if the business applying for the tax deduction was headquartered in another state, the company's personal property located in Michigan triggered the benefit. *Id.* at 186.

The Michigan Supreme Court considered, with detailed care, the precedents of this court, explaining that the Michigan tax incentive program at issue was proper in its promotion of intrastate commerce, while at the same time, not being a discriminatory burden on interstate commerce. *Id.* at 192.

*Caterpillar* is consistent with this Court's rulings in *Boston Stock Exchange*, and other decisions cited herein. It is entirely consistent with the tax incentive offered by the state of Ohio to Petitioner DaimlerChrysler, and it is consistent with the economic development and tax incentive priorities of Wayne County.

Making Wayne County more business friendly, is not illegal under the Dormant Commerce Clause. Businesses that want to come into Wayne County from other counties or states or countries, for that matter, have the equal right to apply for these tax incentives.

## CONCLUSION

The Constitution sets forth, and rests upon, innovative principles original to the American experience such as federalism and a proven balance in political mechanisms through separation of powers. *Roper v. Simmons*, 543 U.S. 551, ___, 125 S. Ct. 1183, 1200 (2005).

Respondents' remedy lies in using those political mechanisms to change the laws that Respondents disagree with. Respondents' remedy does not lie in the courts.

## RELIEF REQUESTED

Wayne County respectfully requests that this Court reverse the decision of the Sixth Circuit.

Respectfully submitted,

EDWARD M. THOMAS
MELVIN BUTCH HOLLOWELL

December 5, 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## DAIMLERCHRYSLER CORP. ET AL. *v.* CUNO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–1704. Argued March 1, 2006—Decided May 15, 2006*

The city of Toledo and State of Ohio sought to encourage DaimlerChrysler Corp. to expand its Toledo operations by offering it local property tax exemptions and a state franchise tax credit. A group of plaintiffs including Toledo residents who pay state and local taxes sued in state court, alleging that the tax breaks violated the Commerce Clause. The taxpayer plaintiffs claimed injury because the tax breaks depleted the state and local treasuries to which they contributed. Defendants removed the action to District Court. Plaintiffs moved to remand to state court because, *inter alia*, they doubted whether they satisfied either the constitutional or prudential limitations on standing in federal court. The District Court declined to remand the case, concluding that plaintiffs had standing under the "municipal taxpayer standing" rule articulated in *Massachusetts* v. *Mellon*, 262 U. S. 447. On the merits, the court found that neither tax benefit violated the Commerce Clause. Without addressing standing, the Sixth Circuit agreed as to the municipal tax exemption, but held that the state franchise tax credit violated the Commerce Clause. Defendants sought certiorari to review the invalidation of the franchise tax credit, and plaintiffs sought certiorari to review the upholding of the property tax exemption. This Court granted review to consider whether the franchise tax credit violates the Commerce Clause, and directed the parties to address the issue of standing.

*Held:* Plaintiffs have not established their standing to challenge the state franchise tax credit. Because they have no standing to challenge that credit, the lower courts erred by considering their claims

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*Together with No. 04–1724, *Wilkins, Tax Commissioner for State of Ohio, et al.* v. *Cuno et al.*, also on certiorari to the same court.

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on the merits. Pp. 4–18.

1. State taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers. Pp. 4–13.

(a) Before this Court can address the merits of plaintiffs' challenge, it has an obligation to assure itself that the merits question is presented in a proper Article III "case" or "controversy." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560. The case-or-controversy limitation is crucial in maintaining the " 'tripartite allocation of power' " set forth in the Constitution. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 474. "Article III standing . . . enforces the . . . case-or-controversy requirement." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11. The requisite elements of standing are familiar: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751. Plaintiffs, as the parties now asserting federal jurisdiction, must carry the burden of establishing their standing. Pp. 4–6.

(b) Plaintiffs' principal claim that the franchise tax credit depletes state funds to which they contribute through their taxes, and thus diminishes the total funds available for lawful uses and imposes disproportionate burdens on them, is insufficient to establish standing under Article III. This Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers. See, *e.g.*, *Valley Forge Christian College*, *supra*, at 476–482. The animating principle behind cases such as *Valley Forge* was announced in *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, in which the Court observed that a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.*, at 486–487. This rationale applies with undiminished force to state taxpayers who allege simply that a state fiscal decision will deplete the fisc and "impose disproportionate burdens on them." See *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429, 433–434. Because state budgets frequently have an array of tax and spending provisions that may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as " 'virtually continuing monitors of the wisdom and soundness' " of state fiscal administration, con-

Syllabus

trary to the more modest role Article III envisions for federal courts. See *Allen*, *supra*, at 760–761. Pp. 7–11.

(c) Also rejected is plaintiffs' argument that they have state taxpayer standing on the ground that their Commerce Clause challenge is just like the Establishment Clause challenge this Court permitted in *Flast* v. *Cohen*, 392 U. S. 83, 105–106. *Flast* allowed an Establishment Clause challenge by federal taxpayers to a congressional action under Art. I, §8. Although *Flast* held out the possibility that "specific [constitutional] limitations" other than the Establishment Clause might support federal taxpayer standing, *id.*, at 105, 85, only the Establishment Clause has been held to do so since *Flast*, see, *e.g.*, *Bowen* v. *Kendrick*, 487 U. S. 589, 618. Plaintiffs' reliance on *Flast* is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to contribute even "three pence" to support a religious establishment that was upheld in *Flast*, 392 U. S., at 103. Indeed, plaintiffs compare the two Clauses at such a high level of generality that almost any constitutional constraint on government power could be likened to the Establishment Clause as interpreted in *Flast*. *Id.*, at 105. And a finding that the Commerce Clause satisfies the *Flast* test because it often implicates governments' fiscal decisions would leave no principled way of distinguishing other constitutional provisions that also constrain governments' taxing and spending decisions. See, *e.g.*, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221. Yet such a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be at odds with *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' "generalized grievances." 392 U. S., at 106. Pp. 11–13.

2. Plaintiffs' status as *municipal* taxpayers does not give them standing to challenge the *state* franchise tax credit at issue.

This Court has noted with approval the standing of municipal taxpayers to enjoin the illegal use of a municipal corporation's funds. See, *e.g.*, *Frothingham*, *supra*, at 486–487. But plaintiffs' attempts to leverage the notion of municipal taxpayer standing into standing to challenge the state tax credit are unavailing. Pp. 13–18.

(a) Plaintiffs argue that because state law requires revenues from the franchise tax to be distributed to local governments, the award of a credit to DaimlerChrysler reduced such distributions and thus depleted the funds of local governments to which plaintiffs pay taxes. But plaintiffs' challenge is still to the state law and state decision, not those of plaintiffs' municipality. Their argument thus suffers from the same defects that the claim of state taxpayer standing exhibits. Pp. 14–15.

(b) Also rejected is plaintiffs' claim that their standing to chal-

lenge the municipal property tax exemption supports jurisdiction over their challenge to the franchise tax credit under the "supplemental jurisdiction" recognized in *Mine Workers* v. *Gibbs*, 383 U. S. 715. *Gibbs* held that federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state-law claims that may be viewed as part of the same case because they "derive from a common nucleus of operative fact" as the federal claim. *Id.*, at 725. Plaintiffs assume that *Gibbs* stands for the proposition that federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case, regardless of the deficiency that would keep the former claims out of federal court if presented on their own. This Court's general approach to the application of *Gibbs* has been markedly more cautious. See, *e.g.*, *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. ___, ___. The Court has never applied *Gibbs*' rationale to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that "serv[e] to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U. S. 149, 155. There is no reason to read *Gibbs*' language as broadly as plaintiffs urge, particularly since the Court's standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press, see, *e.g.*, *Allen*, *supra*, at 752. If standing were commutative, as plaintiffs claim, the Court's insistence that a plaintiff must demonstrate standing separately for each form of relief sought, see, *e.g.*, *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 185, would make little sense when all claims for relief derive from a "common nucleus of operative fact," as they appear to have in cases like *Laidlaw*.

Such a reading of *Gibbs* would have remarkable implications. The doctrines of mootness, ripeness, and political question all originate in Article III's "case" or "controversy" language, no less than standing does. See, *e.g.*, *National Park Hospitality Assn.* v. *Department of Interior*, 538 U. S. 803, 808. Yet if *Gibbs*' "common nucleus" formulation announced a new definition of "case" or "controversy" for all Article III purposes, a federal court would be free to entertain moot or unripe claims, or claims presenting a political question, if they "derived from" the same "operative fact[s]" as another federal claim suffering from none of these defects. Plaintiffs' reading of *Gibbs*, therefore, would amount to a significant revision of the Court's precedent interpreting Article III. With federal courts thus deciding issues they would not otherwise be authorized to decide, the " 'tripartite allocation of power' " that Article III is designed to maintain, *Valley Forge*, *supra*, at 474, would quickly erode, and the Court's emphasis on the

Syllabus

standing requirement's role in maintaining this separation would be rendered hollow rhetoric, see *Lewis* v. *Casey*, 518 U. S. 343, 357. Pp. 15–18.

386 F. 3d 738, vacated in part and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

Nos. 04–1704 and 04–1724

DAIMLERCHRYSLER CORPORATION, ET AL., PETITIONERS
04–1704 *v.*
CHARLOTTE CUNO ET AL.

WILLIAM W. WILKINS, TAX COMMISSIONER FOR THE STATE OF OHIO, ET AL., PETITIONERS
04–1724 *v.*
CHARLOTTE CUNO ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 15, 2006]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Jeeps were first mass-produced in 1941 for the U. S. Army by the Willys-Overland Motor Company in Toledo, Ohio. Nearly 60 years later, the city of Toledo and State of Ohio sought to encourage the current manufacturer of Jeeps—DaimlerChrysler—to expand its Jeep operation in Toledo, by offering local and state tax benefits for new investment. Taxpayers in Toledo sued, alleging that their local and state tax burdens were increased by the tax breaks for DaimlerChrysler, tax breaks that they asserted violated the Commerce Clause. The Court of Appeals agreed that a state tax credit offered under Ohio law violated the Commerce Clause, and state and local officials

and DaimlerChrysler sought review in this Court. We are obligated before reaching this Commerce Clause question to determine whether the taxpayers who objected to the credit have standing to press their complaint in federal court. We conclude that they do not, and we therefore can proceed no further.

## I

Ohio levies a franchise tax "upon corporations for the privilege of doing business in the state, owning or using a part or all of its capital or property in [the] state, or holding a certificate of compliance authorizing it to do business in [the] state." *Wesnovtek Corp.* v. *Wilkins*, 105 Ohio St. 3d 312, 313, 2005–Ohio–1826, ¶2, 825 N. E. 2d 1099, 1100; see Ohio Rev. Code Ann. §5733.01 (Lexis 2005). A taxpayer that purchases "new manufacturing machinery and equipment" and installs it at sites in the State receives a credit against the franchise tax. See §5733.33(B)(1) (Lexis 1999).[1] Municipalities in Ohio may also offer partial property tax waivers to businesses that agree to invest in qualifying areas. See §5709.62(C)(1)(a) (Lexis 2005). With consent from local school districts, the partial property tax waiver can be increased to a complete exemption. See §5709.62(D)(1).

In 1998, DaimlerChrysler entered into a contract with the city of Toledo. Under the contract, DaimlerChrysler agreed to expand its Jeep assembly plant at Stickney Avenue in Toledo. In exchange, the city agreed to waive the property tax for the plant, with the consent of the two school districts in which the plant is located. Because DaimlerChrysler undertook to purchase and install "new

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[1] Ohio has begun phasing out the franchise tax and has discontinued offering new credits against the tax like the one DaimlerChrysler received. See §§5733.01(G), 5733.33(B)(1) (Lexis 2005). Where relevant, therefore, the citations in this opinion are to the statutes in effect at the time DaimlerChrysler made its investment.

manufacturing machinery and equipment," it was also entitled to a credit against the state franchise tax. See §5733.33(B)(1) (Lexis 1999).

Plaintiffs filed suit against various state and local officials and DaimlerChrysler in state court, alleging that these tax benefits violated the Commerce Clause. Most of the plaintiffs were residents of Toledo, who paid taxes to both the city of Toledo and State of Ohio. They claimed that they were injured because the tax breaks for DaimlerChrysler diminished the funds available to the city and State, imposing a "disproportionate burden" on plaintiffs. App. 18a, 23a, 28a.[2]

Defendants removed the action to the United States District Court for the Northern District of Ohio. See 28 U. S. C. §1441. Plaintiffs filed motions to remand the case to state court. See §1447(c). One of the grounds on which they sought remand concerned their standing. They professed "substantial doubts about their ability to satisfy either the constitutional or the prudential limitations on standing in the federal court," and urged the District Court to avoid the issue entirely by remanding. Plaintiffs' Supplemental Motion for Remand to State Court in No. 3:00cv7247, p. 13, Record Doc. 17 (footnote omitted).

The District Court declined to remand the case, concluding that, "[a]t the bare minimum, the Plaintiffs who are taxpayers have standing to object to the property tax exemption and franchise tax credit statutes under the

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[2]Other plaintiffs were residents of Toledo who claimed they were injured because they were displaced by the DaimlerChrysler expansion and Michigan residents who claimed injury because DaimlerChrysler would have expanded its operations in Michigan but for the Ohio investment tax credit. Plaintiffs neither identified these allegations as a basis for standing in their merits brief before this Court nor referred to them at oral argument. Any argument based on these allegations is therefore abandoned. See, *e.g.*, *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855, and n. 3 (1996).

'municipal taxpayer standing' rule articulated in *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923)." App. 78a (citations omitted). On the merits, the District Court found that neither tax benefit violated the Commerce Clause. See 154 F. Supp. 2d 1196 (2001). The Court of Appeals for the Sixth Circuit agreed with the District Court as to the municipal property tax exemption, but held that the state franchise tax credit violated the Commerce Clause. See 386 F. 3d 738 (2004). The Court of Appeals did not address the issue of standing.

Defendants sought certiorari to review the Sixth Circuit's invalidation of the franchise tax credit and plaintiffs sought certiorari to review the upholding of the property tax exemption. We granted certiorari to consider whether the franchise tax credit violates the Commerce Clause, 545 U. S. ___ (2005); the Michigan Supreme Court had decided a similar question contrary to the Sixth Circuit's analysis here. See *Caterpillar, Inc.* v. *Dept. of Treasury*, 440 Mich. 400, 488 N. W. 2d 182 (1992). We also asked the parties to address whether plaintiffs have standing to challenge the franchise tax credit in this litigation.

II

We have "an obligation to assure ourselves" of litigants' standing under Article III. *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180 (2000). We therefore begin by addressing plaintiffs' claims that they have standing as taxpayers to challenge the franchise tax credit.

A

Chief Justice Marshall, in *Marbury* v. *Madison*, 1 Cranch 137 (1803), grounded the Federal Judiciary's authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases. As Marshall explained, "[t]hose who apply the rule to particu-

lar cases, must of necessity expound and interpret that rule." *Id.*, at 177. Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects "'the proper—and properly limited—role of the courts in a democratic society,'" *Allen* v. *Wright*, 468 U. S. 737, 750 (1984) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975)). If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.

This Court has recognized that the case-or-controversy limitation is crucial in maintaining the "'tripartite allocation of power'" set forth in the Constitution. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 474 (1982) (quoting *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968)). Marshall again made the point early on, this time in a speech in the House of Representatives. "A case in law or equity," Marshall remarked,

> "was a term . . . of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed. 1984).

As this Court has explained, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-

court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997) (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976)).

The case-or-controversy requirement thus plays a critical role, and "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11 (2004). The "core component" of the requirement that a litigant have standing to invoke the authority of a federal court "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). The requisite elements of this "core component derived directly from the Constitution" are familiar: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, *supra*, at 751. We have been asked to decide an important question of constitutional law concerning the Commerce Clause. But before we do so, we must find that the question is presented in a "case" or "controversy" that is, in James Madison's words, "of a Judiciary Nature." 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966). That requires plaintiffs, as the parties now asserting federal jurisdiction, to carry the burden of establishing their standing under Article III.[3]

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[3]Because defendants removed the case from state court to District Court, plaintiffs were not initially the parties that invoked federal jurisdiction. Indeed, plaintiffs initially expressed doubts as to their standing. Nonetheless, because "[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne* v. *Geary*, 501 U. S. 312, 316 (1991) (internal quotation marks omitted), the party asserting federal jurisdiction when it is challenged has the burden of establishing it. Whatever the parties' previous positions on the propriety of a federal forum, plaintiffs, as the parties seeking to establish federal jurisdiction, must make the showings required for standing.

B

Plaintiffs principally claim standing by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit "depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments" and thus "diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on" them. App. 28a; see also Brief for Respondents 24. On several occasions, this Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers. Thus the alleged "deprivation of the fair and constitutional use of [a federal taxpayer's] tax dollar" cannot support a challenge to the conveyance of Government land to a private religious college, *Valley Forge, supra,* at 476–482 (internal quotation marks and some brackets omitted), and "the interest of a taxpayer in the moneys of the federal treasury furnishes no basis" to argue that a federal agency's loan practices are unconstitutional, *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478 (1938); see also *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U. S. 208 (1974); *United States* v. *Richardson,* 418 U. S. 166 (1974).

The animating principle behind these cases was announced in their progenitor, *Frothingham* v. *Mellon,* decided with *Massachusetts* v. *Mellon,* 262 U. S. 447 (1923). In rejecting a claim that improper federal appropriations would "increase the burden of future taxation and thereby take [the plaintiff's] property without due process of law," the Court observed that a federal taxpayer's

> "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.,* at 486–487.

This logic is equally applicable to taxpayer challenges to expenditures that deplete the treasury, and to taxpayer challenges to so-called "tax expenditures," which reduce amounts available to the treasury by granting tax credits or exemptions. In either case, the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes.

Standing has been rejected in such cases because the alleged injury is not "concrete and particularized," *Defenders of Wildlife, supra,* at 560, but instead a grievance the taxpayer "suffers in some indefinite way in common with people generally," *Frothingham, supra,* at 488. In addition, the injury is not "actual or imminent," but instead "conjectural or hypothetical." *Defenders of Wildlife, supra,* at 560 (internal quotation marks and citations omitted). As an initial matter, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues. In this very action, the Michigan plaintiffs claimed that they were injured because they lost out on the added revenues that would have accompanied DaimlerChrysler's decision to expand facilities in Michigan. See n. 2, *supra.*

Plaintiffs' alleged injury is also "conjectural or hypothetical" in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing. See *ASARCO Inc.* v. *Kadish,* 490 U. S. 605, 614 (1989) (opinion of KENNEDY, J.) ("[I]t is pure speculation whether the lawsuit would result in any actual tax relief for respondents");

*Warth*, 422 U. S., at 509 (criticizing a taxpayer standing claim for the "conjectural nature of the asserted injury").

A taxpayer-plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the "broad and legitimate discretion" of lawmakers, which "the courts cannot presume either to control or to predict." *ASARCO*, *supra*, at 615 (opinion of KENNEDY, J.). Under such circumstances, we have no assurance that the asserted injury is "imminent"—that it is "certainly impending." *Whitmore* v. *Arkansas*, 495 U. S. 149, 158 (1990) (internal quotation marks omitted); see *Defenders of Wildlife*, 504 U. S., at 564–565, n. 2.

The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers. We indicated as much in *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429 (1952). In that case, we noted our earlier holdings that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect" to support standing to challenge "their manner of expenditure." *Id.*, at 433. We then "reiterate[d]" what we had said in rejecting a federal taxpayer challenge to a federal statute "as equally true when a state Act is assailed: 'The [taxpayer] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.'" *Id.*, at 433–434 (quoting *Frothingham*, *supra*, at 488); see *ASARCO*, *supra*, at 613–614 (opinion of KENNEDY, J.) ("[W]e have likened state taxpayers to federal taxpayers" for purposes of taxpayer standing (citing *Doremus*, *supra*, at 434)).

The allegations of injury that plaintiffs make in their complaint furnish no better basis for finding standing

than those made in the cases where federal taxpayer standing was denied. Plaintiffs claim that DaimlerChrysler's tax credit depletes the Ohio fisc and "impos[es] disproportionate burdens on [them]." App. 28a. This is no different from similar claims by federal taxpayers we have already rejected under Article III as insufficient to establish standing. See, *e.g.*, *Frothingham*, 262 U. S., at 486 (allegation of injury that the effect of government spending "will be to increase the burden of future taxation and thereby take [plaintiff's] property without due process of law").

State policymakers, no less than their federal counterparts, retain broad discretion to make "policy decisions" concerning state spending "in different ways . . . depending on their perceptions of wise state fiscal policy and myriad other circumstances." *ASARCO*, *supra*, at 615 (opinion of KENNEDY, J.). Federal courts may not assume a particular exercise of this state fiscal discretion in establishing standing; a party seeking federal jurisdiction cannot rely on such "[s]peculative inferences . . . to connect [his] injury to the challenged actions of [the defendant]," *Simon*, 426 U. S., at 45; see also *Allen*, 468 U. S., at 759. Indeed, because state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as "'virtually continuing monitors of the wisdom and soundness'" of state fiscal administration, contrary to the more modest role Article III envisions for federal courts. See *id.*, at 760–761 (quoting *Laird* v. *Tatum*, 408 U. S. 1, 15 (1972)).

For the foregoing reasons, we hold that state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as

taxpayers.[4]

C

Plaintiffs argue that an exception to the general prohibition on taxpayer standing should exist for Commerce Clause challenges to state tax or spending decisions, analogizing their Commerce Clause claim to the Establishment Clause challenge we permitted in *Flast* v. *Cohen*, 392 U. S. 83. *Flast* held that because "the Establishment Clause . . . specifically limit[s] the taxing and spending power conferred by Art. I, §8," "a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause. *Id.*, at 105–106. *Flast* held out the possibility that "other specific [constitutional] limitations" on Art. I, §8, might surmount the "barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." 392 U. S., at 105, 85. But as plaintiffs candidly concede, "only the Establishment Clause" has supported federal taxpayer suits since *Flast*. Brief for Respondents 12; see *Bowen* v. *Kendrick*, 487 U. S. 589, 618 (1988) ("Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since *[Flast]*, we have consistently adhered to *Flast* and the narrow exception it

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[4]The majority of the Courts of Appeals to have considered the issue have reached a similar conclusion. See, *e.g.*, *Booth* v. *Hvass*, 302 F. 3d 849 (CA8 2002); *Board of Ed. of Mt. Sinai Union Free School Dist.* v. *New York State Teachers Retirement System*, 60 F. 3d 106 (CA2 1995); *Colorado Taxpayers Union, Inc.* v. *Romer*, 963 F. 2d 1394 (CA10 1992); *Taub* v. *Kentucky*, 842 F. 2d 912 (CA6 1988); *Korioth* v. *Briscoe*, 523 F. 2d 1271 (CA5 1974); but cf. *Arakaki* v. *Lingle*, 423 F. 3d 954, 967–969 (CA9 2005) (finding state taxpayer standing in light of *Hoohuli* v. *Ariyoshi*, 741 F. 2d 1169 (CA9 1984), but noting that JUSTICE KENNEDY's opinion in *ASARCO Inc.* v. *Kadish*, 490 U. S. 605 (1989), would "carry persuasive value" absent *Hoohuli*).

created to the general rule against taxpayer standing").

Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Art. I, §8, plaintiffs' reliance on *Flast* is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to "'contribute three pence . . . for the support of any one [religious] establishment.'" 392 U. S., at 103 (quoting 2 Writings of James Madison 186 (G. Hunt ed. 1901)). Indeed, plaintiffs compare the Establishment Clause to the Commerce Clause at such a high level of generality that almost any constitutional constraint on government power would "specifically limit" a State's taxing and spending power for *Flast* purposes. 392 U. S., at 105; see Brief for Respondents 14 ("In each case, the harm to be avoided by [the two clauses] is the loss of governmental neutrality"). And even if the two clauses are similar in that they often implicate governments' fiscal decisions, see *id.*, at 13–14, a finding that the Commerce Clause satisfies the *Flast* test would leave no principled way of distinguishing those other constitutional provisions that we have recognized constrain governments' taxing and spending decisions. See, *e.g.*, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987) (invalidating state sales tax under the Free Press Clause). Yet such a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent and *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' "generalized grievances." 392 U. S., at 106.

*Flast* is consistent with the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing. The *Flast* Court discerned in the history of the Establishment Clause "the specific evils feared by [its drafters] that the taxing and spending

power would be used to favor one religion over another or to support religion in general." *Id.*, at 103. The Court therefore understood the "injury" alleged in Establishment Clause challenges to federal spending to be the very "extract[ion] and spen[ding]" of "tax money" in aid of religion alleged by a plaintiff. *Id.*, at 106. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally. See *Valley Forge*, 454 U. S., at 514 (STEVENS, J., dissenting) ("[T]he plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in *[Flast]*").

Plaintiffs thus do not have state taxpayer standing on the ground that their Commerce Clause challenge is just like the Establishment Clause challenge in *Flast*.

III

Plaintiffs also claim that their status as *municipal* taxpayers gives them standing to challenge the *state* franchise tax credit at issue here. The *Frothingham* Court noted with approval the standing of municipal residents to enjoin the "illegal use of the moneys of a municipal corporation," relying on "the peculiar relation of the corporate taxpayer to the corporation" to distinguish such a case from the general bar on taxpayer suits. 262 U. S., at 486–487; see *ASARCO*, 490 U. S., at 613–614 (opinion of KENNEDY, J.) (reiterating distinction). Plaintiffs here challenged the municipal property tax exemption as municipal taxpayers. That challenge was rejected by the Court of Appeals on the merits, and no issue regarding plaintiffs' standing to bring it has been raised. In plaintiffs' challenge to the state franchise tax credit, however, they identify no municipal action contributing to any claimed injury. Instead, they try to leverage the notion of municipal taxpayer standing beyond challenges to munici-

pal action, in two ways.

A

First, plaintiffs claim that because state law requires revenues from the franchise tax to be distributed to local governments, Ohio Rev. Code Ann. §5733.12 (Lexis 2005), the award of a credit to DaimlerChrysler reduced such distributions and thus depleted the funds of "local governments to which Respondents pay taxes." Brief for Respondents 16. But plaintiffs' challenge is still to the state law and state decision, not those of their municipality. We have already explained why a state taxpayer lacks standing to challenge a state fiscal decision on the grounds that it might affect his tax liability. All plaintiffs have done in recasting their claims as ones brought by municipal taxpayers whose municipalities receive funding from the State—the level of which might be affected by the same state fiscal decision—is introduce yet another level of conjecture to their already hypothetical claim of injury.

And in fact events have highlighted the peril of assuming that any revenue increase resulting from a taxpayer suit will be put to a particular use. Ohio's General Assembly suspended the statutory budget mechanism that distributes franchise tax revenues to local governments in 2001 and again in its subsequent biennial budgets. See Amended Substitute H. B. 94, 124th General Assembly §140 (2001), available at http://www.legislature.state.oh.us/BillText124/124_HB_94_ENR.pdf (all Internet materials as visited May 12, 2006, and available in Clerk of Court's case file); Amended Substitute H. B. 95, 125th General Assembly §139 (2003), available at http://www.legislature.state.oh.us/BillText125/125_HB_95_EN2_N.pdf; Amended Substitute H. B. 66, 126th General Assembly §557.12 (2005), available at http://www.legislature.state.oh.us/BillText126/126_HB_66_EN2d.pdf. Any effect that enjoining DaimlerChrysler's credit will have on

municipal funds, therefore, will not result from automatic operation of a statutory formula, but from a hypothesis that the state government will choose to direct the supposed revenue from the restored franchise tax to municipalities. This is precisely the sort of conjecture we may not entertain in assessing standing. See *ASARCO*, *supra*, at 614 (opinion of KENNEDY, J.).

B

The second way plaintiffs seek to leverage their standing to challenge the municipal property tax exemption into a challenge to the franchise tax credit is by relying on *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). According to plaintiffs, the "supplemental jurisdiction" recognized in that case supports jurisdiction over all their claims, once the District Court determined they had standing to challenge the property tax exemption. Brief for Respondents 17–18.

*Gibbs* held that federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state-law claims that may be viewed as part of the same case because they "derive from a common nucleus of operative fact" as the federal claim. 383 U. S., at 725. Plaintiffs assume that *Gibbs* stands for the proposition that federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case, regardless of the nature of the deficiency that would keep the former claims out of federal court if presented on their own.

Our general approach to the application of *Gibbs*, however, has been markedly more cautious. For example, as a matter of statutory construction of the pertinent jurisidictional provisions, we refused to extend *Gibbs* to allow claims to be asserted against nondiverse parties when jurisdiction was based on diversity, see *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978), and we

refused to extend *Gibbs* to authorize supplemental jurisdiction over claims that do not satisfy statutory amount-in-controversy requirements, see *Finley* v. *United States*, 490 U. S. 545 (1989). As the Court explained just last Term, "[w]e have not . . . applied *Gibbs*' expansive interpretive approach to other aspects of the jurisdictional statutes." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. ___, ___ (2005) (slip op., at 5) (applying 28 U. S. C. §1367, enacted in 1990, to allow a federal court in a diversity action to exercise supplemental jurisdiction over additional diverse plaintiffs whose claims failed to meet the amount-in-controversy threshold).

What we have never done is apply the rationale of *Gibbs* to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that "serv[e] to identify those disputes which are appropriately resolved through the judicial process." *Whitmore*, 495 U. S., at 155. We see no reason to read the language of *Gibbs* so broadly, particularly since our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press. See *Allen*, 468 U. S., at 752 ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims* asserted" (emphasis added)). We have insisted, for instance, that "a plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U. S., at 185; see *Los Angeles* v. *Lyons*, 461 U. S. 95, 109 (1983). But if standing were commutative, as plaintiffs claim, this insistence would make little sense when all claims for relief derive from a "common nucleus of operative fact," as they certainly appear to have in both *Laidlaw*, *supra*, at 175–179, and *Lyons*, *supra*, at 97–98.

Plaintiffs' reading of *Gibbs* to allow standing as to one claim to suffice for all claims arising from the same "nu-

cleus of operative fact" would have remarkable implications. The doctrines of mootness, ripeness, and political question all originate in Article III's "case" or "controversy" language, no less than standing does. See, *e.g.*, *National Park Hospitality Assn.* v. *Department of Interior*, 538 U. S. 803, 808 (2003) (ripeness); *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67 (1997) (mootness); *Reservists Comm. to Stop the War*, 418 U. S., at 215 (political question). Yet if *Gibbs*' "common nucleus" formulation announced a new definition of "case" or "controversy" for all Article III purposes, a federal court would be free to entertain moot or unripe claims, or claims presenting a political question, if they "derived from" the same "operative fact[s]" as another federal claim suffering from none of these defects. Plaintiffs' reading of *Gibbs*, therefore, would amount to a significant revision of our precedent interpreting Article III. With federal courts thus deciding issues they would not otherwise be authorized to decide, the "'tripartite allocation of power'" that Article III is designed to maintain, *Valley Forge*, 454 U. S., at 474, would quickly erode; our emphasis on the standing requirement's role in maintaining this separation would be rendered hollow rhetoric. As we have explained, "[t]he actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Lewis* v. *Casey*, 518 U. S. 343, 357 (1996).

*Lewis* emphasized that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Ibid.* Plaintiffs' theory of ancillary standing would contravene this principle. Plaintiffs failed to establish Article III injury with respect to their *state* taxes, and even if they did do so with respect

to their *municipal* taxes, that injury does not entitle them to seek a remedy as to the state taxes. As the Court summed up the point in *Lewis*, "standing is not dispensed in gross." *Id.*, at 358, n. 6.[5]

* * *

All the theories plaintiffs have offered to support their standing to challenge the franchise tax credit are unavailing. Because plaintiffs have no standing to challenge that credit, the lower courts erred by considering their claims against it on the merits. The judgment of the Sixth Circuit is therefore vacated in part, and the cases are remanded for dismissal of plaintiffs' challenge to the franchise tax credit.

*It is so ordered.*

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[5]In defending the contrary position, plaintiffs rely on three cases from the Courts of Appeals. But two of those cases hold only that, once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have "'failed to comply with its statutory mandate.'" *Sierra Club* v. *Adams*, 578 F. 2d 389, 392 (CADC 1978) (quoting *Sierra Club* v. *Morton*, 405 U. S. 727, 737 (1972)); see also *Iowa Independent Bankers* v. *Board of Governors of Fed. Reserve*, 511 F. 2d 1288, 1293–1294 (CADC 1975). They do not establish that the litigant can, by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him. In the third case, the Court of Appeals relied substantially on the fact that "all courts possess an inherent power to prevent unprofessional conduct by those attorneys who are practicing before them" in allowing the Government to contest the division of a damages award it was ordered to pay between a plaintiff and his attorney. *Jackson* v. *United States*, 881 F. 2d 707, 710–711 (CA9 1989). That situation is rather far afield from the question before us.

# SUPREME COURT OF THE UNITED STATES

Nos. 04–1704 and 04–1724

DAIMLERCHRYSLER CORPORATION, ET AL., PETITIONERS
04–1704 *v.*
CHARLOTTE CUNO ET AL.

WILLIAM W. WILKINS, TAX COMMISSIONER FOR THE STATE OF OHIO, ET AL., PETITIONERS
04–1724 *v.*
CHARLOTTE CUNO ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 15, 2006]

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

Today's decision, the Court rightly points out, is solidly grounded in longstanding precedent, *Frothingham* v. *Mellon* (decided with *Massachusetts* v. *Mellon*), 262 U. S. 447 (1923), and *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429 (1952), decisions that antedate current jurisprudence on standing to sue. See *ante*, at 7, 9. *Frothingham* held nonjusticiable a federal taxpayer's suit challenging a federal-spending program. See 262 U. S., at 487 (describing taxpayer's interest as "minute and indeterminable"). *Doremus* applied *Frothingham*'s reasoning to a state taxpayer's suit. 342 U. S., at 434. These decisions exclude from federal-court cognizance claims, not delineated by Congress, presenting generalized grievances. An exception to *Frothingham*'s rule, recognized post-*Doremus* in *Flast* v. *Cohen*, 392 U. S. 83 (1968), covers certain al-

leged violations of the Establishment Clause. The *Flast* exception has not been extended to other areas. See *Bowen* v. *Kendrick*, 487 U. S. 589, 618 (1988); cf. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 417–418 (1996).

One can accept, as I do, the nonjusticiability of *Frothingham*-type federal and state taxpayer suits in federal court without endorsing as well the limitations on standing later declared in *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26 (1976) *(EKWRO)*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), *Allen* v. *Wright*, 468 U. S. 737 (1984), and *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992). See *EKWRO*, 426 U. S., at 54–66 (Brennan, J., concurring in judgment); *Valley Forge*, 454 U. S., at 513–515 (STEVENS, J., dissenting); *Allen*, 468 U. S., at 783–795 (STEVENS, J., dissenting), and the overturned Court of Appeals opinion, *Wright* v. *Regan*, 656 F. 2d 820, 828–832 (CADC 1981) (Ginsburg, J.); *Defenders of Wildlife*, 504 U. S., at 582–585 (STEVENS, J., concurring in judgment); Sunstein, What's Standing after *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 203–205, 228–229 (1992) (contrasting *Lujan*, *Allen*, and *EKWRO* with *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978)); Fletcher, The Structure of Standing, 98 Yale L. J. 221, 267–270 (1988) (commenting on *Flast* and *Valley Forge*). Noting this large reservation, I concur in the judgment, and in the balance of the Court's opinion.